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Investor-State Dispute Settlement and the Application of the Rule of Law Under the ICSID Convention

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This paper examines the relationship between the Investor-State Dispute Settlement (ISDS) mechanism and the application of the rule of law under the International Centre for Settlement of Investment Disputes (ICSID) Convention. It analyses how ISDS, as a mechanism for resolving disputes between investors and states, affects the principles of transparency, accountability, and fairness in international investment law. The study also explores the potential challenges and criticisms surrounding ISDS, including concerns about its impact on state sovereignty and its potential to favour investors over states. Additionally, it examines the role of the rule of law in ensuring a balanced and equitable resolution of investment disputes. The study concludes by calling for a comprehensive review of ISDS mechanisms to address these concerns and strengthen the application of the rule of law in international investment disputes. It suggests the need for greater transparency and accountability in ISDS proceedings, as well as the establishment of an independent and impartial body to oversee the resolution of investment disputes.

Keywords: Investor-State Dispute Settlement, International Centre for Settlement of Investment Disputes, rule of law

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Introduction

Having an Investor-State Dispute Settlement System as an adjudication platform that meets the threshold of the Principles of the Rule of Law is the desire of any investor and states that have decided how their affairs can be regulated and maintained. It takes investment treaties, including BITs and MITs, to ensure the investor-state relationship is amicably maintained through the entrusted model forum (Bonnitcha & Brewin, 2020, p. 1). This instance is reflected in the International Investment Law by having an established forum known as the ICSID. for adjudicating investment matters under the Convention[1], and International Law applies to treaties.[2]

The relationship between the ISDS and the application of the Rule of Law seems to be inseparable from its foundation, based on the argument that the established system works best when the basic principles of the Rule of Law are incorporated therein.[3] The law must be known and accessible; the judiciary system must be open, independent, and impartial; there must be fair and prompt trials; the law and its administration must be subjected to open and free criticism; and the laws must be made in an open and transparent way by the people.[4]

However, unlike other branches of International Economic Law, such as Trade Law, International Investment Law has more than three thousand BITs and Multilateral Investment Treaties as the major foundation of ISDS. (Organisation for Economic Co-operation and Development, 2012, pp. 4-5), whereby all these are similar sources of law but there are no identical provisions therein (Organisation for Economic Co-operation and Development, 2012, pp. 4-5). Moreover, as the major reason, the ISDS under the ICSID Convention is considered as a system of its own kind sui generis with unstable pillars and an unjust basis to adjudicate investor-state matters under the cornerstone of International Investment Law (Gangjee, 2020, pp. 256-257).

Given that, in addressing the ISDS. System under the ICSID Convention, this legal paper sets out to address one major system question: is there a perfect existing relationship between the International Investment Dispute Settlement System and principles under the Rule of Law? Therefore, this study sets out to address the question in six major parts. Part I: An Introductory Party covers the general skeleton, flow, and rationale behind the author's malice in writing about the selected topic. Parts I and II will mainly rely on the Foundations and Recognition of the Investor-State Dispute Settlement under the ICSID Convention and its key features. Part III: Under this part, the role of the Rule of Law's Principles in relation to the ISDS System is critically examined based on a comparative approach. Part IV: After examining the areas related, criticisms of ISDS are presented. Part V: International Perspective Pertaining to ISDS and Application of the Rule of Law. Part IV: Conclusion

Foundation, and Recognition of ISDS Under the ICSID Convention, and Its Key Features

Foundation and Recognition of ISDS

Investor-State Dispute Settlement (ISDS) has its roots in the early 20th century, when countries started entering into bilateral investment treaties (BITs) to protect foreign investors (David, 2021). These treaties aimed

[1] Articles 1-3 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID/April 15, 2006) (From now on, referred to as the ICSID Convention).
[2] Vienna Convention on the Law of the Treaty, May 23, 1969, 1155 UNTS 18232 (From now on, referred to as VCLT).
[3] https://www.uscourts.gov/educational-resources/educational-activities/overview-rule-law, accessed on May 26, 2023.
[4] https://www.ruleoflaw.org.au/about-us, accessed on May 26, 2023.

to provide legal mechanisms for resolving disputes between foreign investors and host states, ensuring fair treatment and compensation for any harm caused.[5] Over time, ISDS has evolved and gained prominence as a means to promote investment flows and protect investor rights (Hornkohl & Melikyan, 2022). In recent years, there has been a significant increase in investment disputes globally. This rise can be attributed to various factors, such as the liberalization of trade and investment policies, the growing complexity of global markets, and the increasing number of bilateral and multilateral investment agreements.[6]

One example of a significant investment dispute is the case of *Chevron Corporation vs. Ecuador*. In this dispute, Chevron sued the Ecuadorian government for $9.5 billion, alleging that the government violated a bilateral investment treaty by allowing pollution in the Amazon rainforest. The case involved complex legal arguments, extensive expert testimony, and multiple appeals, highlighting the growing complexity of global markets and the importance of investment agreements in resolving disputes.[7] Therefore, ISDS often arises due to disagreements over issues such as breach of contract, expropriation of assets, discriminatory treatment, or regulatory changes that affect investors' rights. As a result, the need for an effective system for resolving these disputes has become important (Sarmiento, 2015).

Therefore, the ICSID Convention was designed to encourage international investment by establishing a forum that was expected to be neutral and independent for the resolution of investment disputes.[8] It provides a specialized arbitration process that allows foreign investors to bring claims against host states for alleged violations of investment treaties or agreements (Neafie, 2018). Therefore, the application of the rule of law has become essential to safeguarding the integrity, transparency, and fairness of this dispute settlement mechanism.[9] Additionally, the evolution and expansion of ISDS in international investment agreements can be seen in the inclusion of provisions that address not only direct expropriation but also indirect expropriation and fair and equitable treatment (Joachim & Marie, 2014).

For example, in the Comprehensive Economic and Trade Agreement (CETA) between the European Union and Canada, ISDS provisions go beyond protecting against direct expropriation. They also cover indirect expropriation, which refers to measures or actions that substantially deprive investors of the fundamental attributes of their investments. Additionally, the agreement includes provisions on fair and equitable treatment to

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[5] International Chamber of Commerce, International Code of Fair Treatment of Foreign Investment, ICC Pub. No. 129 (Paris: Lecraw Press, 1948), reprinted in UNCTAD, International Investment Instruments: A Compendium, Vol. 3 (New York: United Nations, 1996) [IIA Compendium] at 273.

[6] In the Gabckovo-Nagymaros Project case, a dispute between Hungary and Slovakia (1997), the International Court of Justice (ICJ), despite explicit or implicit mentioning of sustainable development in the 16 September 1977 treaty concerning the construction and operation of the Gabeikovo-Nagymaros System of Locks, decided that in operating the Gabckovo power plant parties should take into account the effects it produces on the environment, as "this need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development (see Paras. 140-141). In the Pulp Mills case, the ICJ referred to its findings in the Gabckovo-Nagymaros Project case (see Paras. 76-77). The judgement also recognised the need to strike a balance between the use of the waters and the protection of the river consistent with the objective of sustainable development" (Para. 177). In 2005, an arbitral tribunal made a landmark recognition of sustainable development in its award in the case concerning the Iron Rhine railway between Belgium and the Netherlands. However, in this case, the arbitral tribunal went even beyond qualifying "environmental law and law on development" as principles of general international law (Para. 59), which constitutes one of the recognised legally binding sources of international law under Article 38(1) of the ICJ Statute.

[7] UNCITRAL (1976) PCA Case No. 34877.

[8] See Articles 1 and 2 of ICSID.

[9] (Kurşun v. Turkey, 2018, §§ 103-104). In applying procedural rules, the courts must avoid both excessive formalism that would impair the fairness of the proceedings and excessive flexibility that would render nugatory the procedural requirements laid down in statutes.

ensure that investors are not subject to discriminatory or arbitrary treatment by host states, providing a comprehensive framework for investment protection.[10]

Understanding the concept of Investor-State Dispute Settlement is crucial for both investors and host states. It helps investors protect their investments and ensures fair treatment by host states, while also providing a framework for resolving disputes without resorting to lengthy and costly litigation in domestic courts. Additionally, it is expected to promote transparency and stability in international investment by providing a predictable system for resolving conflicts between investors and states (Cahill-O'Callaghan, Howard, & Brekoulakis, 2023).

The International Centre for Settlement of Investment Disputes (ICSID) is an international organization that provides a forum for the settlement of investment disputes between foreign investors and host countries.[11] It was established in 1966 as part of the World Bank Group and operates under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.[12] The main objective of ICSID is to promote international investment by providing a neutral and efficient mechanism for resolving disputes, thereby enhancing investor confidence and contributing to dispute enhancement.[13]

Therefore, the scope and applicability of the ICSID Convention are crucial aspects to consider in international investment disputes.[14] The Convention applies to disputes arising directly out of an investment between a foreign investor and a host state, including disputes regarding the interpretation or application of investment agreements (Schreuer, 2014, pp. 1-2). It is important to note that the Convention does not cover contractual disputes or purely commercial matters unrelated to an investment. Additionally, the Convention's scope extends to both legal and factual issues, providing a comprehensive framework for resolving investment disputes through arbitration (Fanou, 2022).

Key Features of ISDS Under the ICSID Convention

Impartiality and independence. The ICSID Convention seems to emphasise the importance of impartiality and independence of arbitrators by requiring the tribunal to be composed of independent experts from various backgrounds, ensuring a fair and unbiased decision-making process.[15] Hence, Investor-State Dispute Settlement includes the provision for neutral arbitration panels to resolve disputes between investors and host states. These panels are typically composed of experienced arbitrators who are expected to possess knowledge of international investment law.[16]

The ICSID Convention, as an international treaty that establishes a framework for resolving investment disputes between states and foreign investors, faces challenges to its legitimacy.[17] Critics of Relevant Provisions Under the ICSID Convention Relating to Impartiality and Independence, argue that the current provisions do not adequately address conflicts of interest and potential bias among arbitrators. It was argued that the lack of clear

[10] https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/canada/eu-canada-agreement/ceta-chapter-chapteren, accessed on July 16th, 2023.
[11] Article 1 (1) of ICSID.
[12] Article 2 of ICSID.
[13] Article 1(2) of ICSID.
[14] Article 46 of ICSID.
[15] Articles 12 and 14 (1) of the Convention.
[16] Article 14 of the ICSID.
[17] See Article 1 of the ICSID Convention.

guidelines for disclosure and recusal can undermine the integrity and credibility of the arbitration process. Additionally, they suggest that the ICSID should consider implementing stricter qualifications and vetting procedures for arbitrators to ensure a higher level of impartiality and independence. By doing so, it would enhance the overall perception of and confidence in the arbitration process (Charles & Schill, 2008).

Provided that, this instance is still unsolved under International Investment Law, ruled in the case of *Romak S.A. v. Republic of Uzbekistan*. In this case, the tribunal was criticised for not demonstrating sufficient independence and impartiality in its decision-making process. The criticism stemmed from allegations that certain members of the tribunal had conflicts of interest, which raised concerns about their ability to render an unbiased judgement.[18]

In the case of *Metalclad Corporation v. United Mexican States*, Metalclad, a Canadian corporation, claimed that the actions of the Mexican government violated NAFTA's investment protections. The tribunal ruled in favour of Metalclad, stating that Mexico's actions were inconsistent with its obligations under the treaty. However, critics argue that the tribunal's decision showcased a lack of independence and impartiality due to potential conflicts of interest among the arbitrators involved.[19] A more interesting rule was established in the case of *World Duty Free Company Ltd. v. Republic of Kenya*. In this case, the tribunal's decision was challenged due to concerns about the independence and impartiality of one of the arbitrators. The criticism stemmed from the fact that the arbitrator had previously acted as counsel in a related matter involving one of the parties, raising doubts about their ability to remain neutral and unbiased in their decision-making process.[20]

With challenges to conflict of interest in the courts in recent years, arbitrations under the ICSID Convention have become increasingly prevalent. Due to the complexity of international investment arbitration cases and the potential for bias or impartiality, these obstacles frequently arise. For example, in a high-profile case involving a multinational corporation and a host country's government, the arbitrators appointed by the ICSID may have previously worked for the same corporation or have close ties to its legal team, raising concerns about their ability to remain impartial. This conflict of interest could undermine the integrity of the arbitration process and compromise the fairness of the final decision (Maria, 2017, pp. 12-18).

Due to the complexity of international investment arbitration cases and the potential for partiality or impartiality, there are often concerns about the process's integrity, resulting in concerns regarding the process's integrity, which can erode public trust and confidence in international investment arbitration, which can ultimately impact the legitimacy of the entire system by undermining public faith and confidence in international investment arbitration, ultimately affecting the legitimacy of the entire system, stakeholders are concerned, and reforms are required (Ricky, Jeong, & Azam, 2023).

Lord Bingham, in the case of *Starr v. Ruxtom* and the landmark case of *Millar v. Dickson*, the Privy Council noted that if we view investment treaty arbitration as a form of public law adjudication, it becomes evident that it fails to meet the standards of independence and impartiality set by public law. A comparison can be drawn with the Appointment of temporary sheriffs in Scotland by ministerial officials and whether this process aligns with

[18] 08 Civ. 00356 (SAS), 2010 WL 3297753 (SDNY Aug. 20, 2010).
[19] ICSID Case No. ARB(AF)/97/1, September 28, 2000.
[20] [2017] EWHC 1478 (Comm).

the guarantee enshrined in the European Convention on Human Rights, which guarantees the right to a fair hearing before an "independent and impartial tribunal established by law."[21]

> I am not suggesting in any way that there has ever been any impropriety, either on the part of temporary sheriffs or on the part of any holder of any ministerial office or of their officials. But I would add that if a judge is not independent, then however great his integrity is, it may be very difficult for him to know whether his lack of independence affects how he carries out his judicial duties. And however, determined a minister or public servant may be to carry out his functions in the judiciary only based on wholly appropriate considerations, it will be important for him to remember that his confidence in his integrity is not and cannot be regarded as a guarantee.[22]

Enforcement of an award. ICSID awards are binding on the parties and are enforceable in over 160 member states. This ensures the effectiveness and enforceability of the decisions rendered by the tribunal. Awards are crucial for the effectiveness and credibility of the entire system. Without proper enforcement mechanisms, parties may not feel compelled to comply with the decisions made, undermining the purpose of ISDS.[23] Moreover, it seems ISDS under the Convention allows for the enforcement of arbitral awards, providing investors with a means to seek compensation if their rights have been violated in a final and conclusive manner.[24] This feature enhances investor confidence and encourages greater investment flows by ensuring that potential disputes can be resolved fairly and effectively (Dimitropoulos, 2018).

Steps on Enforcement of an Award

Application for the enforcement of the award. Firstly, the winning party must request the enforcement of the award from the competent court in the jurisdiction where enforcement is sought. In order to enforce an award under the ICSID Convention, the winning party must provide the court with all necessary documents and evidence to support their request. The court will then examine the award and ensure that it meets the requirements for enforcement under the ICSID Convention. If the court is satisfied, it will issue an order for enforcement, allowing the winning party to take the necessary steps to recover the awarded amount.[25]

Execution of an award. Secondly, once the court grants enforcement of the award under the ICSID Convention, the winning party can proceed with executing the award by seeking attachment or seizure of assets belonging to the losing party. Attachment or seizure of assets is a common method used to enforce ICSID awards, as it allows the winning party to satisfy the monetary obligations imposed by the award. This process involves obtaining a court order that allows for the freezing or confiscation of the losing party's assets, which can then be sold or liquidated to generate funds for payment.[26]

However, the situation is different in cases where the losing party is a sovereign state. As per the principle of state immunity, sovereign states are generally immune from enforcement actions in foreign jurisdictions, making it difficult for the winning party to seize assets or enforce the award against them. This can create

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[21] *Starr v. Ruxtom* [2000] JC 208, 234 (also cited by Lord Bingham for the Privy Council in Millar v. Dickson [2001] UKPC D4).
[22] *Starr v. Ruxtom* [2000] JC 208, 234 (also cited by Lord Bingham for the Privy Council in Millar v. Dickson [2001] UKPC D4).
[23] Award ICSID Convention Arbitration (2022 Rules).
[24] Article 53 of the ICSID and https://icsid.worldbank.org/procedures/arbitration/convention/award/2022, accessed on July 16, 2023.
[25] See Article 54 of the ICSID Convention, which applies to the application for enforcement of an award. A party seeking enforcement can apply to a competent court in the jurisdiction where the other party's assets are located, treating the award as a final.
[26] *Ibid.* Article 54 of the ICSID Convention applies to the execution of awards, requiring each contracting state to recognise and enforce the award as binding. This allows for enforcement in other states, subject to domestic law and treaties. The process may differ between states, so parties should familiarise themselves with the relevant domestic laws for smooth and successful enforcement.

challenges when actually enforcing awards against sovereign states under the ICSID Convention. The enforcement of awards against sovereign states under the ICSID Convention can be seen in the case of *NML Capital Ltd. v. Argentina*. This case was decided by the United States Court of Appeals for the Second Circuit and involved a dispute between NML Capital Ltd., a hedge fund, and the government of Argentina over defaulted sovereign debt. The court's decision had significant implications for international debt restructuring and the ability of creditors to enforce their rights against sovereign nations. In this case, Argentina defaulted on its sovereign debt and refused to comply with an arbitral award ordering it to pay the bondholders. Despite the award being in favour of the bondholders, Argentina claimed sovereign immunity and successfully avoided having its assets seized or enforced against it in foreign jurisdictions.[27]

Additionally, in the case of *Yukos Oil v. Russia*, Russia was ordered to pay $50 billion to Yukos Oil for expropriating its assets. However, Russia refused to comply with the award and argued that it was not bound by the decision as it violated its domestic laws. As a result, Yukos Oil was unable to enforce the award and recover the compensation it was entitled to. These cases highlight the challenges faced by investors in enforcing arbitral awards against sovereign states, especially when they invoke sovereign immunity or domestic law as a defence.[28]

Moreover, the issue is different when any issue relating to the enforcement of an award before ICSID affects its previous decision. Cemented in the case of *Tza Yap Shum v. Peru*, the claimant challenged the enforcement of an ICSID award on the grounds of a breach of due process. The tribunal ultimately dismissed the claim, emphasising that it is not within its jurisdiction to review the merits of an award once it has been rendered.[29] International conventions and treaties, such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, play a vital role in ensuring that ISDS awards are recognized and enforced across different jurisdictions. This promotes confidence in the system and encourages investment by providing assurance that contractual obligations will be upheld (Park, 2018).

An example of case law under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards[30] is the case of *Chromalloy v. Arab Republic of Egypt*. In this case, Chromalloy, a US company, filed a claim against Egypt for expropriation of its investment in an Egyptian company. The tribunal found in favor of Chromalloy and awarded substantial damages. However, Egypt challenged the enforcement of the award in US courts, arguing that it violated public policy. The court ultimately upheld the award and recognized Egypt's obligations under the New York Convention to enforce foreign arbitral awards.[31]

The Role of the Rule of Law in ISDS Cases

The role of the rule of law in ISDS (Investor-State Dispute Settlement) as established under the ICSID (International Centre for Settlement of Investment Disputes) Convention is crucial in ensuring fairness and impartiality in resolving investment disputes between states and foreign investors (Schill, 2015, pp. 1-3). It provides a framework for the application of legal principles, ensuring that decisions are based on established laws

[27] 727 F.3d 230 (2d Cir. 2013).
[28] 695 F.3d 17 (D.C. Cir. 2012).
[29] ICSID Case Number ARB/07/6, July 7, 2011.
[30] New York, adopted on June 10, 1958.
[31] Civil No. 94-2339 (JLG), July 31, 1996. Matter of Chromalloy Aeroservices, 939 F. Supp. 907 (DDC 1996).

and regulations rather than arbitrary or discriminatory actions.[32] Additionally, the rule of law promotes transparency and accountability, fostering confidence in the ISDS system and encouraging foreign investors to engage in cross-border investments with greater certainty (International Bar Association, 2018, pp. 53-60). The ICSID Convention seems to establish a neutral and independent forum for dispute resolution, enabling parties to present their cases and receive a fair and impartial judgement. This not only protects the rights of foreign investors but also helps to maintain a stable and predictable investment environment, ultimately contributing to economic growth and development.[33]

Rule of Law Principles in Relation to ISDS

The law must be known and accessible. Under the concept of rule of law, the law must be known and accessible by the community in order to ensure accountability and transparency.[34] By making the legal framework encircling ISDS readily accessible and comprehensible, it enables a comprehensive examination of its provisions and safeguards against any potential misuse or abuse. In addition, an accessible legal system allows detractors to effectively express their concerns and participate in informed discussions, fostering a more balanced and inclusive dialogue on the benefits and drawbacks of ISDS.[35] For instance, if the legal framework governing ISDS is readily accessible, critics can examine specific cases and identify any bias or inequity patterns. They can examine arbitral tribunals' rulings and decisions to determine if they uphold fundamental principles of justice and respect for human rights. This level of transparency and accountability aids in preventing the misuse of ISDS mechanisms and promotes a more equitable international investment system.[36]

In the landmark case of *R v. Sussex Justices, Ex parte McCarthy*, the Court emphasized that the law must be known and accessible to all individuals, regardless of their background or status, in order to uphold the principles of transparency and accountability within a democratic society. This decision underscores the importance of providing equal access to legal information and ensuring that it is readily available to all members of society.[37]

An easy-to-understand legal framework for ISDS allows a thorough examination of provisions and safeguards. In contrast, certain treaties contain stringent confidentiality clauses that restrict public access to information regarding investor-state arbitration cases. This lack of transparency undermines the principles of accountability and impedes public scrutiny of tribunal decisions, which may result in outcomes that are not in the best interests of society.[38]

The case of *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, is an example of recent case law regarding the ISDS's refusal to permit public access to information about a case proceeding before ICSID. In this instance, the Spanish company *Urbaser* lodged a claim against Argentina under the auspices of ICSID. The dispute was precipitated by the termination of a concession

[32] https://www.ruleoflaw.org.au/what-is-the-rule-of-law/, accessed on June 11, 2023.
[33] https://www.hcourt.gov.au/assets/publications/speeches/currentjustices/haynej/haynej_DisputeResolutionBeijing.html, accessed on June 11, 2023.
[34] http://www.act4ruleoflaw.org/en/news/ruleoflaw, accessed on June 11, 2023.
[35] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, July 24, 2008.
[36] International Bar Association (2018), Supra Note.
[37] [1924] 1 KB 256.
[38] *Supra* note, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, July 24, 2008.

contract for water and sanitation services. The ICSID denied public access to certain case-related documents, citing concerns over confidentiality and the preservation of sensitive information. This decision prompted discussions about the transparency and accountability of ISDS proceedings.[39]

The judicial system must be open, independent, and impartial. This implies that court proceedings, judgements, and legal reasoning should be made available to the public, allowing for scrutiny and nurturing confidence in the system.[40] Additionally, independence is essential for the judicial system because it ensures that judges make decisions without external influences or pressures.[41] This independence enables them to interpret and apply the law without favoritism or bias.[42] Finally, impartiality is crucial because it ensures that everyone is treated equally and equitably under the law, regardless of their origin, status, or personal connections. Impartiality guarantees that the judicial system adheres to the principles of justice and maintains the public's faith in its capacity to render equitable decisions.[43] Therefore, transparency, independence, and impartiality are the pillars of a strong and reliable judicial system that promotes the rule of law and protects the rights and liberties of individuals in society.[44]

One landmark case that exemplifies the importance of open trials is *Richmond Newspapers, Inc. v. Virginia* (1980). In this case, the Supreme Court ruled that the First Amendment guarantees the public and media access to criminal trials unless there are compelling reasons to close them. This decision reaffirmed the principle of transparency in the justice system and emphasized the role of public scrutiny in upholding accountability and fairness.[45]

The importance of judicial independence was observed in late 2002 when a United States Supreme Court case, *Republican Party of Minnesota v. White*, held that restrictions on judicial candidates' ability to express their views on disputed legal and political issues violated their First Amendment rights. This ruling underscored the significance of allowing judges to exercise their freedom of speech and maintain impartiality in their decision-making process.[46]

There must be fair and prompt trials. To ensure equitable and expeditious trials under the rule of law, it is essential to establish a judiciary that is free from external influence or pressure. In addition, strict observance of due process rights, such as the right to legal representation, access to evidence, and a fair and impartial jury selection procedure, should be maintained. In *Brown v. Board of Education* (1954), the Supreme Court of the United States ruled that racial segregation was unconstitutional, emphasizing that impartiality is crucial to ensuring equal treatment and opportunities for all citizens, regardless of their race or ethnicity. This decision played a pivotal role in advancing civil rights and dismantling discriminatory systems.[47]

The law and its administration must be subjected to free criticism. The rule of law ensures the system and its administrators are subjected to free criticism and scrutiny, preventing abuse of power and maintaining

[39] ICSID Case No. ARB/07/26, Award, 8 December 2016.
[40] https://www.judiciary.uk/about-the-judiciary/our-justice-system/three-is/, accessed on June 25, 2023.
[41] https://uollb.com/blog/law/judicial-independence, accessed on June 25, 2023.
[42] https://thelawdictionary.org/article/nepotism-cronyism-favouritism-illegal/, accessed on June 25, 2023.
[43] https://mediate.com/impartiality/, accessed on June 25, 2023.
[44] https://mediate.com/impartiality/, accessed on June 25, 2023.
[45] 448 US 555 (1980).
[46] 536 US 765 (2002).
[47] 347 US 483 (1954).

accountability. The Supreme Court's landmark case, *United States v. Nixon*, demonstrated the power of the rule of law in upholding accountability and trust in the legal system. This ruling upheld the principle of checks and balances and reassured Americans about the government's commitment to transparency and fairness, even among high-ranking officials.

However, the application of the rule of law's principles in relation to the ISDS seems to be challenged due to the fact that the established system to resolve disputes between investors and states failed to function under the ambit of the rule of law.

For instance, the point of equal treatment between parties. It has been observed in the case of *Chevron vs. Ecuador*. Chevron sued Ecuador through the ISDS system for alleged damages resulting from environmental contamination caused by its operations in the country. Despite evidence of significant pollution and health risks to local communities, the tribunal ruled in favour of Chevron, dismissing Ecuador's counterclaims and ordering the country to pay millions in damages. This decision raised concerns about the ability of the ISDS system to adequately address environmental and social issues, undermining the credibility of the system as a whole. Critics argue that the prioritization of corporate interests over the well-being of affected communities sends a discouraging message to multinational corporations, allowing them to act with impunity. These rulings highlight the power imbalance inherent in the ISDS system, where wealthy corporations can effectively manipulate the legal process to their advantage, leaving affected communities without recourse or justice. As a result, there have been calls for reforms to the ISDS system to ensure that environmental and social concerns are given equal weight and that affected communities have a fair chance to seek justice.[48]

The need for a fair and balanced approach under ISDS. The challenges of the role of the rule of law in ISDS under the ICSID Convention can be seen in the famous case of *Philip Morris Brands Sàrl, Philip Morris Products S.A., and Abal Hermanos S.A. v. Oriental Republic of Uruguay*. In this case, Philip Morris, a multinational tobacco company, filed a lawsuit against Uruguay, challenging its strict tobacco control measures. The case raised important questions about the balance between public health and investor rights and the role of ISDS in addressing such issues. The outcome of this case showcased the complexities involved in reconciling the interests of public health and investor rights within the framework of ISDS. The ICSID tribunal ultimately ruled in favour of Uruguay, upholding the country's right to implement measures aimed at protecting public health. This decision highlighted the significance of the rule of law in ISDS, as it demonstrated that states have the authority to regulate in the public interest without fear of facing substantial financial consequences from investor claims. Furthermore, it emphasised the need for a fair and balanced approach to addressing conflicts between public policy objectives and investor protection within the ISDS system.[49]

The need for clear and transparent investment laws. In this case, *Metalclad Corporation v. United Mexican States*, Metalclad, a Canadian corporation, filed a claim against Mexico under the ICSID Convention for expropriation of its investment in a hazardous waste facility. The tribunal ruled in favour of *Metalclad*, stating that Mexico's actions violated the fair and equitable treatment standard under international law. This case demonstrates the complexities involved in balancing the rule of law with investor-state dispute settlement

[48] 795 F.3d 200 (2d Cir. 2015).
[49] ICSID Case No. ARB/10/7 2016.

mechanisms, as it raises questions about the extent to which a government can regulate and protect its environment without risking potential legal action from foreign investors. It also highlights the need for clear and transparent investment laws and regulations to avoid ambiguity and potential conflicts. Additionally, the case brings attention to the importance of considering the potential environmental impact of foreign investments and the responsibility of both investors and host countries to ensure sustainable and responsible business practises.[50]

Furthermore, *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco* is the Arbitral case law that highlights the rule of law as a fundamental principle underlying the ICSID Convention. The tribunal emphasised that the rule of law requires states to adhere to their legal obligations and treat foreign investors fairly and impartially. A violation of these principles, according to the court, undermines predictability and accountability.[51]

It has been provided that transparency ensures that all proceedings and decisions are open to scrutiny, allowing for public confidence in the process. Impartiality ensures that all parties are treated fairly and without bias, ensuring a level playing field. Accountability holds decision-makers responsible for their actions, ensuring that they act within the boundaries of the law and can be held accountable for any misconduct. These principles collectively promote a fair and just resolution of investment disputes (Renwald, 2006). It should be noted that the importance of the rule of law in ISDS cases is that the rule of law plays a crucial role in ISDS (Investor-State Dispute Settlement) cases. It ensures that disputes between investors and states are resolved fairly, transparently, and impartially.[52] By upholding the rule of law, ISDS mechanisms provide a predictable and stable legal framework for both investors and states, promoting trust and confidence in the international investment system. The rule of law safeguards against arbitrary or discriminatory actions by states, ensuring that investors are treated fairly and their rights are protected (Kim, 2016).

Criticisms of ISDS

Lack of Transparency and Accountability

Lack of transparency and accountability on ISDS under the ICSID Convention has raised concerns among critics. They argue that, among the challenges, the closed-door nature of ISDS proceedings and the lack of public access to information undermine democratic principles and hinder the ability to hold parties accountable for their actions. Additionally, some critics believe that the absence of clear guidelines for arbitrators and limited opportunities for appeal contribute to a system that lacks sufficient checks and balances (Schill, 2017).

The closed-door nature of ISDS proceedings under the ICSID convention. The closed-door nature of proceedings under the ICSID Convention has raised concerns about transparency and accountability. Critics argue that the lack of public access to hearings and documents limits the ability to scrutinise the decisions made by arbitrators. Additionally, some argue that the secretive nature of ISDS proceedings may allow for conflicts of interest or bias among arbitrators to go unnoticed. This lack of transparency and accountability raises concerns about the fairness and integrity of the arbitration process (International Bar Association, 2018). *Urbaser v. Argentina*: this case involved a dispute between Urbaser, a Spanish company, and Argentina regarding the

[50] 40 I.L.M. 36 (2001).
[51] ICSID Case No. ARB/00/4.
[52] https://www.hcourt.gov.au/assets/publications/speeches/currentjustices/haynej/haynej_DisputeResolutionBeijing.html, accessed on July 17, 2023.

termination of a concession contract for water and sanitation services in Buenos Aires. The decision by the ICSID tribunal established important precedents in international investment law. This is the case law that highlights the closed-door nature of ISDS proceedings under the ICSID Convention. In this case, the arbitral tribunal ruled that the public was not allowed to attend or observe the hearings, emphasising the confidential and private nature of ISDS proceedings. This decision further solidified the notion that ISDS proceedings are conducted behind closed doors, limiting transparency and public scrutiny.[53]

The lack of public access to information undermines democratic principles. In the case of *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, the arbitrator issued a directive to prevent the public disclosure of information regarding a failed water services concession, which had significant implications for the residents of Dar-es-Salaam. The rationale provided for this directive was to protect the confidentiality of the arbitral proceedings. However, it is worth noting that one of the acknowledged issues before the Tribunal was the clear existence of public interest. Nevertheless, the Tribunal enforced a "gag order" throughout the proceedings and treated all documents as strictly confidential per the investor's request. By interfering with the public's right and ability to learn about the dispute, as well as the government's obligations and intentions to divulge such information, this action unquestionably undermines the validity of the arbitral proceedings.[54]

In *Methanex Corp. v. United States of America*, a decision was made before the Tribunal pertaining to the acceptance of Amicus Curiae on January 15, 2001. As a result, the Tribunal concluded that, in the interest of ensuring fairness and promoting transparency, reforms to arbitration rules and the inclusion of provisions on transparency within certain international investment agreements (IIAs) have led to a growing acceptance of amicus curiae participation in investor-state arbitrations. This enables the public to contribute specialised knowledge or expertise to the Tribunal. By allowing the involvement of interested non-parties, tribunals can improve the quality of their awards and ensure their fairness by providing a platform for those affected by the outcome to have a voice.[55]

States have made the wrong choice by employing arbitration in this manner. The main objective of this case's persuasive argument is to comprehend and put into effect the existing legal framework in a solid and persuasive way. By creating an adjudicative institution that satisfies those characteristics, it will be possible to correct the current system's shortcomings in judicial independence and impartiality. The actions taken by states are evident at this stage, and it is crucial to acknowledge that they made a mistake. There is a need to reformulate the system, and the option is the Investment Court System, which respects the rules and standards of interpretation and decision-making.[56]

Limited opportunities for appeal contribute to a system that lacks sufficient checks and balances. One of the things that should be kept in mind is that the decision of arbitration in Investor-state investment matters is a *sui generis* decision, a type of decision of its kind that is hard to find in other decision-making forums.[57]

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[53] (ICSID) Case No. ARB/07/26, Decision on Jurisdiction and Liability, 8 December 2016.
[54] ICSID Case Number: A.R.B./05/22, Award, July 24, 2008.
[55] ICSID (Arbitration Tribunal). 31st December, 2000; 15th January, 2001; 7th August, 2002.
[56] UNCTAD, IIA Issues Note No. June 2, 2017: Phase 2 of IIA Reform: Modernising the Existing Stock of Old-Generation Treaties, https://investmentpolicy.unctad.org/publications/173/iia-issues-note-phase-2-of-iia-reform figure 7. UNCTAD's Phase 1 was committed to helping States craft their model IIAs tailored to their specific development and regulatory requirements and supporting States in negotiating more "balanced" accords (accessed on June 2, 2023).
[57] A Latin term meaning "of its kind" is used to describe an item that is unique or different from the norm, unlike anything else. It may be an exception to the law, such as a right or power created individually and specifically in its category. It is commonly used

Therefore, to get redress and appeals, it must comply with the established system, which most states refer to as illegitimate since it is limited in scope under the principle of finality of arbitral awards (Gantz, 2006, p. 39).

> Article 53 declares that the parties are bound by the award and that it shall not be subject to appeal or any other remedy except those provided for in the Convention. The remedies provided are revision under Article 51 and annulment under Article 52 of the I.C.D.I.S. Convention. In addition, a party may ask a Tribunal that omitted to decide any question submitted to it to supplement its award as provided under Article 49(2) and may request interpretation of the award in as far as Article 50 of the I.C.D.I.S. Convention is provided.[58]

This is the major area in which the ISDS Model receives criticism and is still challenging. Reforming or adopting a court system will give parties their major right to redress through appeal and furnish a stage for a trusted system that resembles a domestic forum in dispute settlement.[59] *Albert Jan van den Berg* (2019) illustrates that it is now a century since the ISDS was seen to establish an appellate mechanism. "The present discussion at Working Group III of UNCITRAL shows that several delegates have concerns regarding the consistency, coherence, predictability, and correctness of arbitral decisions by ISDS tribunals." (Berg, 2019, p. 157). It proves the system needs to observe the substantive standard of protection and respect established rules.[60]

Lack of transparency and accountability in the ISDS process under the ICSID Convention is further provided in the case of *Philip Morris v. Uruguay*. In this case, the tobacco company sued Uruguay for implementing graphic health warnings on cigarette packages, arguing that it violated its intellectual property rights. The lack of transparency became evident when it was revealed that key documents and evidence were kept confidential, preventing public scrutiny of the proceedings. Furthermore, concerns about accountability arose as the arbitrators appointed to hear the case had potential conflicts.[61]

Regulatory Chill

In the case of *Philip Morris*, it was argued that ISDS provisions can have a chilling effect on host states' regulation and policymaking. This case demonstrated how the existence of ISDS provisions can discourage nations from enacting public health regulations out of apprehension that they will become embroiled in costly legal disputes with major multinational corporations. Concerns arise when states fear potential liability for legitimate and non-discriminatory regulatory measures, such as public health or environmental regulations. Another concern is the potential for regulatory chill, where governments may hesitate to implement or enforce regulations that could be challenged through ISDS.[62] This could hinder the ability of governments to protect public health, safety, and the environment. Furthermore, the impact on public policy is a significant issue, as decisions made through ISDS can undermine democratic processes and limit a government's ability to make decisions in the best interest of its citizens (Schram, Friel, VanDuzer, Ruckert, & Labonté, 2018).

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in case law: A "*sui generis* case" or "*sui generis* authority" means that the decision in the case may not be precedent-setting and is limited to the case's specific facts. It is a decision that may not be able to be used for a broader application. https://dictionary.thelaw.com/sui-generis, accessed on May 7, 2023.

58 ICSID Convention, ICSID Case Number ARB/07/6, July 7, 2011.

59 "In addition, the mandate focuses on the procedural aspects of dispute settlement rather than on the substantive provisions (A/CN.9/930, para. 20)." UNCITRAL, Possible Reform of Investor-State Dispute Settlement (ISDS), Note by the Secretariat, A/CN.9/WG.III/WP.149, September 5, 2018, Paragraph 18.

60 UNGA, Possible Reform of Investor-State Dispute Settlement (ISDS): Consistency and Related Matters (2018) UN Doc A/CN.9/WG.III/WP.150 (Secretariat's Note).

61 ICSID Case No. ARB/10/7, July 8, 2018.

62 ICSID Case No. ARB/10/7, July 8, 2018.

Moreover, as cemented in the case of *Philip Morris v. Uruguay*, which examined the balance between public health measures and investor rights, this case highlights the importance of carefully considering the rule of law when interpreting and applying ISDS provisions under the ICSID framework.[63] Moreover, through visitation, one notable case is the *Chevron v. Ecuador dispute*, where Chevron alleged that Ecuador violated its obligations under the US-Ecuador Bilateral Investment Treaty. The ICSID tribunal ruled in favour of Chevron, highlighting the importance of respecting contractual obligations and providing fair treatment to foreign investors. However, critics argue that ISDS tribunals can undermine domestic legal systems and limit a country's ability to regulate in the public interest.[64]

Therefore, *Tarzi* observed that disproportionate power dynamics favouring multinational corporations can further exacerbate these concerns. With their vast resources and legal expertise, multinational corporations may have the upper hand in ISDS cases, making it difficult for governments to effectively defend their regulations and policies. This imbalance of power can ultimately have a chilling effect on governments' willingness to enact necessary regulations, ultimately compromising the well-being of their citizens (Tarzi, 1991).

Lack of Consistency in Decision Making and Violation of State Sovereignty

In the context of international investment law, the ability of states to make judgements on internal issues, notably in the delicate area of taxes, continues to present substantial obstacles and lead to disputes between states and multinational corporations (MNCs). In investor-state dispute settlement (ISDS) tribunals, MNCs and foreign investors have aggressively used the framework of international investment law (I.I.L.) to contest taxing policies imposed by sovereign governments (Ranjan, 2023, pp. 220, 222-223).

Although ISDS tribunals generally respect a state's sovereign right to impose taxes, they also acknowledge certain limitations on this power. ISDS tribunals have demonstrated their willingness to establish principles that deem the abuse of taxation powers or the imposition of unreasonable or disproportionate taxes inconsistent with a country's obligations under investment treaties (Ranjan, 2023, p. 221). This reinforces the notion that imposing taxes against investors, following domestic law, can be seen as a different form of appropriation within the ISDS model (Ranjan, 2023, pp. 222-223).

In the case of *Electrabel S.A. v. The Republic of Hungary*, the Tribunal held:

> To establish indirect expropriation, the requirement under international law for the investor to establish a substantial, radical, severe, devastating, or fundamental deprivation of its rights or the virtual annihilation, effective neutralization, or factual destruction of its investment, its value, or enjoyment.[65]

Whereas in the case of *El Paso Energy International Company v. The Argentine Republic* Held that:

> the tax policy of a country is a matter relating to the sovereign power of the State and its power to impose taxes on its territory. The Tribunal agrees that the State has a sovereign right to enact the tax measures it deems appropriate at any particular time.[66]

In addition, the Tribunal also heard the case of *Burlington Resources Inc. v. Republic of Ecuador*. Held: "The

[63] Award ICSID Convention Arbitration (2022 Rules).
[64] *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador* (II) (PCA Case No. 2009-23).
[65] ICSID Case No. A.R.B./07/1.
[66] *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15 see Paragraph 260.

general taxation is part of the State's regulatory power and does not constitute an expropriation."[67]

Inconsistency in decisions before I.C.S.I.D. with similar material facts is the result of having an illegitimate adjudication system. Applying the Doctrine of Precedence could be a major solution because of its established and applicable rules (Norton, 2018, p. 280), like a common law legal system (Lewis, 2021, p. 878).

Lack of Appellate Body

Like in any form of gentlemen business agreement, consent became crux element in all situations.[68] Whereas, the consent to Arbitration is provided under Article 25 of the ICSID Convention as a binding agreement between the parties involved in a dispute to resolve their conflicts through an arbitration process administered by the International Centre for Settlement of Investment Dispute (ICSID).[69] On the perspective of consent, it is required both the host state and the foreign investor must consent to arbitration as assurance of voluntarily submit to the jurisdiction of the ICSID tribunal and agree to be bound by its decisions (Potesta, 2011).

It has been provided in one of the case laws before ICSID, where appeals are not allowed under the International Centre for Settlement of Investment Disputes (ICSID) is the case of CMS *Gas Transmission Company v. Argentine Republic*. In this case, the tribunal held that the investor's consent to arbitration was established through the signing and ratification of the bilateral investment treaty between the United States and Argentina, which incorporated the ICSID Convention. The tribunal emphasized that consent must be given by both parties and that it cannot be unilaterally withdrawn once given, providing clarity on the importance and permanence of consent in international arbitration. The ruling sets a precedent for future cases, ensuring that once an investor has agreed to arbitration under a bilateral investment treaty, their consent cannot be revoked by either party. This decision reinforces the stability and reliability of investment treaties, promoting confidence among investors and ensuring a fair and impartial dispute resolution process.[70]

Additionally, showing the consent as major concept before Center, was further observed in the case of *Emilio Agust ń Maffezini v. The Kingdom of Spain*, whereby, the ICSID tribunal ruled that there is no provision for appeals in the ICSID Convention or the ICSID Arbitration Rules, thereby establishing a precedent that appeals are not permitted within the ICSID framework. This decision reaffirmed the finality and binding nature of ICSID.[71] Therefore, it should be noted that, the consent to Arbitration under ICSID is enforceable and final, with limited grounds for annulment or appeal. Once a decision is reached, it is binding on both parties involved. There is no further recourse to challenge the decision. The decision is considered legally binding and cannot be overturned or appealed. The parties involved must abide by the decision and accept its consequences, as it is a final and binding resolution to the dispute, and there is no further recourse available after the decision has been made.[72]

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[67] *Burlington Resources Inc. v. the Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability.
[68] https://www.govinfo.gov/content/pkg/CPRT-106SPRT66922/html/CPRT-106SPRT66922.html, accessed on 16th July, 2023.
[69] ICSID Convention.
[70] *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8) (Annulment Decision, September 25, 2007).
[71] ICSID Case No. ARB/97/7 (2017).
[72] Article 51-54 of the ICSID.

International Perspective Pertaining to ISDS and Application of the Rule of Law

Recent developments and reforms in Investor-State Dispute Settlement have aimed to address some of these concerns. For example, there has been a push for greater transparency in ISDS proceedings, allowing for more public scrutiny and accountability. Additionally, efforts have been made to establish a permanent international investment court, which would provide a more impartial and consistent forum for resolving disputes. These developments seek to restore some balance and ensure that governments can protect their citizens without fear of facing undue pressure from multinational corporations (Cafari Panico & Di Benedetto, 2016).

Efforts to enhance transparency and public participation in ISDS have also been made in recent years. This includes measures such as allowing third-party interventions and amicus curiae submissions, as well as making arbitration proceedings open to the public. These initiatives aim to address concerns about the lack of accountability and legitimacy in the ISDS system, ultimately increasing public trust and confidence in the resolution of investment disputes (Horn Kohl & Melikyan, 2022).

Proposals for a multilateral investment court to replace ISDS have also gained traction. This would involve establishing a permanent court with independent judges to handle investment disputes, ensuring consistency and impartiality in decision-making. Additionally, efforts have been made to enhance transparency and improve the selection process of arbitrators, further strengthening the legitimacy of the system. These reforms seek to strike a balance between protecting investors' rights and addressing public concerns, fostering a more equitable and trusted framework for resolving investment disputes (Yang, 2023).

Conclusion

In a nutshell, without prejudice to the established content of this legal paper, ISDS under ICSID after critically examining the ICSID Convention and Case Laws, it was observed that the ISDS mechanism under the ICSID Convention plays a crucial role in the resolution of investment disputes. By upholding the rule of law, ISDS is expected to provide a fair and impartial forum for the settlement of disputes and offer protection to both foreign investors and host states. To support the arguments, case laws, legal and non-legal books, and the works of the different authors interested in national and International Investment law were visited to a greater extent than scholarly scholars were allowed to do so. Whereas, under this legal paper, the ISDS System established under the International Centre for Settlement of Investment Disputes was observed to lack the ability to act under the required rules as established under the concept of the rule of Law. As the results suggest, reformation is proposed as the way forward to cure the challenge.

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