INTERNATIONAL INVESTMENT LAW AND DEVELOPING ECONOMIES: THE GOOD, BAD AND COMME CI, COMME ÇA

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I. Introduction

Investor-State dispute resolution relates to the process of decision-making that transnational corporations undergo when analyzing whether to invest their capital in a particular country. The international community has created a variety of devices, such as the Washington Convention for Settlement of Investment Disputes ("Washington Convention or the ICSID Convention") and the International Centre for the Settlement of Investment Disputes ("ICSID"), that enable the developing countries to signal the rest that they are willing to adopt a system that provides for protection of foreign direct investment ("FDI")[1] These signals transform into 'credible commitments' to treat foreign investors fairly[2] and presumably increase the appeal of these countries to foreign investors.

The developing economies and their attitude towards the ICSID Convention and the ICSID have been complex. During the first decades of ICSID's existence, most of the Association of Southeast Asian Nations ("ASEAN") countries adopted it, but virtually all Latin American countries avoided it, preferring to adopt a system of "internationalisation" of foreign investment contracts, which was inherently weak. In the 1990's, developing countries started to open up their economies and steps were taken in order to attract foreign capital. Developing countries' contempt for FDI largely disappeared and a vast majority of the Latin American countries became member States of the ICSID. Other developing countries like Russia and China joined in the 1990's. India never joined the ICSID. Though all the BRIC (Brazil, Russia, India and China) countries have entered into a lot of BITs for the promotion of trade, there seems to be a variety in the attitude of these countries when it comes to dispute resolution.

Conversely, the attitude of the developing countries towards ICSID in the recent past has been bordering the negative. This seems to be the case especially with Latin America. The most hostile of the developing countries are Bolivia, Ecuador, and Venezuela. In 2007, Bolivia became the first country ever to

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[1] Ignacio A. Vincentelli, *The Uncertain Future of ICSID in Latin America*, 16(3) LAW & BUS. REV. AM. 409 (2010).

[2] Zachary Elkins, Andrew T. Guzman and Beth A. Simmons, *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000,* 60(4) INTERNATIONAL ORGANIZATION 822 (2006).

denounce the ICSID Convention, thus formally withdrawing from ICSID.[3] Ecuador and Venezuela followed suit.

This article looks at the reasons developing economies entered into Bilateral Investment Treaties ("BITs"), the settlement of disputes though investment arbitration, the frustration of developing economies with investment arbitration and possible outcomes in the future for the settlement of investment disputes.

II. Foreign Direct Investments and Developing Economies

One of the key factors for growth and development of a country's economy is capital. Foreign direct investments are one source of capital that developing economies are keen to tap into. Many developing countries enter into BITs with developed countries and with each other for transfer of capital.[4] Allowing FDI though looks like a sound economic choice, States will have to realize that international investments attract international rules and hence international forums for settlement of dispute. These international disputes and the awards from international disputes become enforceable through various treaties and conventions such as the ICSID, the country is part of.

FDI through BITs lays down various structural stresses on the host state. This starts right at the beginning when the host state provides tax incentives or tax breaks, special export or import tariff, waiver of various customs and excises, carbon credits, infrastructural benefits and such other exemptions to lure investment. Though the investment brings about short terms gains, in the longer run, how much the host state gains is a questionable factor. Host nations hence should account for the various factors before entering into a BIT. Host nations should also negotiate better to address its concerns before setting off to sign investment treaty agreements. They should also have a strong administrative system coupled with an active legislature and a robust judiciary. Though most BITs have clauses that reduce the functions of the host states involvement, it is up to the host state to convince the investor to repose faith in the domestic system. Investors are in general, uncomfortable with host state's administration and they further distance themselves from the host state's judiciary for reasons of bias. One of the reasons the investors prefer investment arbitrations is the factor of neutrality. Investors are apprehensive about the host state's administration, especially with developing countries, more so, with underdeveloped countries. These countries are in a developmental phase in

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[3] VINCENTELLI, *supra* note 1.

[4] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Arab Republic of Egypt for the Promotion and Protection of Investments, *signed* June 11, 1975, *entered into force*, February 24, 1976 and India and Mauritius, BIT, September 4, 1998, w.e.f June 20, 2000.

regard to their administrative structure. BITs[5] provide for offsetting the lacunae in the domestic structure by providing for international investment arbitration. Investment arbitrations provide the structure needed to address investor- state disputes. Though the host state might not accept it willingly, it becomes one of the precursors for the FDI to go through, as the investment provides the much needed capital that gives the host country a competitive edge amongst other developing countries in a globalised economy.

The scope of Bilateral Investment Treaties is generally applied to all or most of the economic activities of foreign investors as a result of the broad connotation provided to the term 'investment' under the treaty. Hence, the scope of the investor to bring about an investment dispute against the host country, before an arbitral tribunal, is also expanded.

III. Investor Rights

Though Bilateral Investment Treaties are assumed to promote the interests of the foreign investor, the underlying principles of such treaties emanate from sound principles entrenched traditionally under international law. The right of equality and fair play are the basis from which investment treaties developed,[6] in allowing not just the state parties to the treaties, but the investors themselves to directly bring a claim before an international tribunal. Also, a number of treaties are drafted to ensure that contracts concluded by the host state and a foreign investor under the laws of the host state are also subject to the international guarantees provided by the treaty, including the dispute settlement mechanism under Articles 25 and 26 of the ICSID Convention, which pose that states have to refrain from requesting that local remedies be pursued. In turn, the investor's home state agrees not to grant diplomatic protection. Because the guarantees contained in the treaty are placed outside of the realm of diplomatic negotiations on the state-to-state level, the laws of the host state are subject to international review at the will of a foreign investor. At the same time, the classical stance of international law as inter-state law is modified in the field of foreign investment by lifting individuals onto the international plane vis-`a-vis the host state.[7]

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[5] Giorgio Sacerdoti, *The Proliferation of BITs: Conflicts of Treaties, Proceedings and Awards* (Bocconi Legal Studies Research Paper No. 07/02, 2007).

[6] Review written by Dr. Stephan W. Schill for IOANA TUDOR. *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment.* Oxford: Oxford University Press, Pp. xxxii (2008),

[7] Aishwarya Padmanabhan, *Relationship Between FDI Inflows and Bilateral Investment Treaties/International Investment Treaties in Developing Economies: An Empirical Analysis* 22, (2011) (unpublished manuscript) *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1764342.

In investment treaty arbitration jurisprudence, there are various ways for an individual entity or person to be qualified the right to bring an international claim against the state. The problem lies in the fact that under investment treaties, the particular form of individualization that is adopted is far- reaching. This is strengthened by two essential aspects. First, many investment treaties limit or remove the duty of the investor the need to exhaust local remedies and allowing them to bring a claim before the host state's courts have had the opportunity to resolve the dispute.[8] This was also laid down in the case of Maffezini (Emilio Agustin) v. Kingdom of Spain (2000)[9], CME Czech Republic BV v. Czech Republic (2003)[10] as well as Societe Generale de Surveillance v. Pakistan (2003)[11]. Second, these treaties encourage forum-shopping by allowing claims by foreign corporations without imposing restrictions in shareholder nationality or minimum thresholds of foreign ownership and control.[12] Thus, this gives a multitude of individual investors to bring claims more easily to the detriment of the host state, leading invariably to large number of litigations.

Further, under investment treaties, the host state's general consent and ratification of the bilateral treaty entails a broad waiver of its immunity from suit, not only before an international tribunal but also before a domestic court called upon to enforce an award. In addition, investment treaties authorize the enforcement of awards by investors under the ICSID Convention or the New York Convention. As a result, investors can seek enforcement of an award against assets of the respondent state in any state that is a party to these treaties.[13]

Thus, if a state refuses to abide by an award, it may be subject to diplomatic and economic pressure from the home state, from other capital-exporting states, from international financial institutions, and from the international capital market. Further, investment treaties often obligate states in express terms to recognize and enforce an award issued under the treaty, which allows an investor to seek enforcement in the courts of any state party to the treaty itself. Most importantly, where an investment treaty provides for enforcement under the ICSID Convention, the Panama Convention or the New York Convention, an investor can seek enforcement in the domestic courts of any state party to these arbitration treaties. This method of enforcement, according to Van Harten, is

[8] GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW (Voughan Lowe ed., Oxford Univ. Press 2007).
[9] Agustín Emilio Case Maffezini v. The Kingdom of *Spain*, ICSID No. ARB/97/7.
[10] CME Czech Republic BV v. Czech Republic, Partial award and separate opinion, Ad hoc—UNCITRAL Arbitration Rules, IIC 61 (2001).
[11] SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13. Decision on objection to jurisdiction, (Aug. 6, 2003)
[12] *See Id.*
[13] *Id.*

exceptionally powerful as most states have ratified at least one of these three treaties: for example, approximately 165 states are party to either the New York Convention or the ICSID Convention

Based on this structure, investment treaty awards are more widely enforceable than the rulings of any court or tribunal, international or domestic that has the authority to resolve individual claims in regulatory disputes. For instance, the few human rights treaties that allow an international court or tribunal to hear individual claims do not authorize enforcement by domestic courts, whereas judgments of the International Court of Justice are enforceable only by the UN Security Council. In contrast, awards issued by investment treaty tribunals are enforceable in the courts of as many as 165 countries, which gives them coercive power and force that is unrivalled in public law adjudication.[14] Thus, as a system, the treaties greatly expand state liability in public law by extending it to legislative and judicial acts, and by allowing damages to be awarded in the absence of fault.

By opening the door to parallel claims and forum-shopping under so many treaties, states, specially developing economies, have moved too far to their detriment in international business. It seems they have executed a transformation of international obligations and adjudication without adequate consideration of the consequences.

IV. Reversal of fortunes for International Investment Arbitration

International Investment Arbitration has drawn the ire of the developing countries as it is seen as one sided and favouring the investors. Interpretation of contracts by arbitral tribunals vary, but the assumption of developing countries is that tribunals look only into the business aspect of contracts and seldom look into overall picture for which the BIT was signed. This pushes countries to prefer local jurisdiction over international investment arbitration.

Countries that plunge into economic crises get affected the most. A few examples are Argentina, Indonesia and Venezuela.

A. Case Study

i. Argentina

More than 30 cases of the cases presently pending before ICSID have been brought against the Republic of Argentina and assert that the Argentine Government's response to the catastrophic financial crisis that hit the country in late 2001 and 2002 impaired investor rights secured under several of Argentina's

[14] *Id.*

BITs/IIAs.[15] These cases are of extraordinary importance, not just because of the immense financial liability to which they expose Argentina, but also because, in response, Argentina has invoked a broad set of legal arguments about the rights of states to craft policy responses to extraordinary situations such as a massive financial collapse.

It all started in the last weeks of 2001 when Argentina experienced a financial collapse of magnum proportions.[16] In one day alone, the peso lost 40% of its value. In response to the crisis, which some likened to the Great Depression of the 1930s in the United States, Argentina adopted several measures to stabilize the economy and restore political confidence. Among these efforts was a significant devaluation of the peso through terminating the currency board, which pegged the peso to the US dollar, the pacification of all financial obligations, and the effective freezing of all bank accounts through a series of measures known collectively as the Corralito.[17]

Though these measures offered a long-term prospect of restored economic confidence and stability, they also imposed immediate and painful costs on all participants in the Argentine economy, including foreign investors. While the Argentine citizens had little recourse legally, many foreign investors, who were harmed by Argentina's response to the crisis, sought legal protection under the regime of BITs which Argentina had entered in to the 1980s and 1990s; (UNCTAD, 2000) apart from offering investors guarantees including the internationalisation of contractual breached ("umbrella clauses"), national treatment and most favoured nation protections, these treaties often provided investors the possibility of direct investor-state arbitration.[18]

For investors harmed by Argentina's response to the economic crisis, the possibility of direct arbitration against the Argentine government for breaches of BITs offered a potentially promising means to recoup losses suffered during the crisis. Claims framed as a violation of a BIT could be brought directly against

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[15] William W. Burke-White, *The Argentine Financial Crisis: State Liability under BITs and the Legitimacy of the ICSID System, in* THE BACKLASK AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY 407, 408 (Michael Waibel et al. eds., 2010) [hereinafter Burke-White, 2010].

[16] William W. Burke-White, *The Argentine Financial Crisis: State Liability under BITs and the Legitimacy of the ICSID System* 3 (U of Penn, Inst for Law & Econ Research Paper No. 08-01, 2008) [hereinafter Burke-White].

[17] CARINA LOPEZ, STANDARD & POOR'S, THE ARGENTINE CRISES: A CHRONOLOGY OF EVENTS AFTER THE SOVEREIGN DEFAULT (2002) *available at* http://www.standardandpoors.com/europe/francais/Fr_news/Argentine- Chronology-of-Events_12-04-02.html.

[18] M. SORNARAJAH, THE SETTLEMENT OF FOREIGN INVESTMENT DISPUTES 95 (2000).

Argentina through ICSID. Only limited means are available to challenge ICSID awards and such awards are generally enforceable in national courts.[19]

Not surprisingly, Argentina has become subject to no fewer than 43 ICSID arbitrations brought by investors asserting that Argentina's response to the crisis harmed investments protected by various BITs/IIAs (ICSID, 2007). Argentina's potential liability from these cases alone could be greater than US $ 8 billion, more than the entire financial reserves of the Argentine government in 2002. Some have speculated that the total value of potential claims against Argentina could reach US $ 80 billion.[20]

Argentina asserted two separate arguments that go to the heart of the sovereign prerogative of states to develop policies to address exceptional circumstances. This first is based on treaty law and the second, on customary international law. Argentina's treaty law argument invokes the non- precluded measures ("NPM") provisions of Argentine BITs that exempt certain actions taken by states in response to extraordinary circumstances from the substantive protections of the treaties. According to Argentina's customary international law argument, the doctrine of necessity precludes the wrongfulness of Argentina's actions in response to the crisis. These arbitrations, thus, test both the limits of state freedom of action and investor protections under the BIT regime in exceptional circumstances. The resulting jurisprudence of the ICSID tribunals in the four cases against Argentina decided as of early 2008 is deeply problematic, due to poor legal reasoning and questionable treaty interpretations. In fact, these litigations have cost Argentina very dearly as it has been made responsible for harms to investors notwithstanding the severe financial crisis it faced.

From the case studies stated above, a reasonable amount of apprehension and caution must be applied as conflicting decisions have arisen from the tribunals in these cases and establish no precedent and hence there is no stability or certainty that could comfort developing and emerging economies that could face a catastrophic crisis.

Companies have certain options that countries are not endowed with, which in turn permit companies to excuse themselves for dishonouring contracts. An option for a company that goes through bankruptcy can end up with rescheduled or even discharged debt, renegotiated union contracts and relief from contractual pension obligations. Surely, it is not surprising that a backlash occurs when a host country fails to receive similar relief from obligations to direct investors when it faces severe economic problems.

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[19] BURKE-WHITE, *supra* note 16, at 5.
[20] BURKE-WHITE, 2010, *supra* note 15, at 411.

In fact, the regimes that handle sovereign obligations of developing countries generate oddly perverse outcomes. With arbitrators' rigid interpretation on contract, foreign direct investors are likely to come out better in crisis-stricken countries than are holders of sovereign debt. Governments sometimes reduce the value of debt unilaterally – by 70% or so in the Argentine case- or negotiations in the London Club or the Paris Club result in rescheduling or partial discharge – while foreign direct investors stand to be made whole by arbitrators. This creates a topsy-turvy world where foreign direct investors stand ahead of debt holders in the queue for claims in crises. Direct investors hold equity in their projects and contend that they should earn higher returns than lenders, as compensation for the risks associated with equity.[21] Yet, when it comes to dispute settlement for countries in crises, the priorities are the opposite of what a bankruptcy court would establish inside an industrialized country.

Further, States have increasingly relied on customary public international law as a defence to excuse investment treaty breached. Argentina, in particular, has recently invoked the doctrine of necessity to excuse any breaches of its investment treaty obligations in the numerous disputes that arose from the economic crisis of 1999-2002. Such public international law defences, collectively called state defences, excuse a state's actions if specific preconditions are met. These include force majeure, necessity, bribery or international public policy, legitimate exercise of sovereignty, including other several defences based on customary public international law. Though these defences can be invoked even in the absence of a specific provision in an investment treaty, they are subject to strict limitations. Only a limited number of investment arbitration tribunals have accepted state defences.[22]

Moreover, it needs to be pointed out that even when these defences are successful; their effect is often merely to suspend the state's obligation for a short period of time. In practice, that means that the state defence will only reduce the amount of compensation payable and the state will not be fully excused for its behaviour. Thus, state defences are not an easy way for a state to escape its international responsibility. Even the defense of "legitimate use of sovereign power" has not yet been established in the realm of investment arbitration – only three tribunals have relied on this defence to date. However, it has been noted by Martinez that the trend is beginning to look as if the tribunals are now more willing to consider the specific circumstances faced by states and less perceptive to the plight of investors. This is arguably a symptom of the backlash against investment arbitration.[23]

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[21] WAIBLE, MICHAEL, ET. AL, THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY (2010).
[22] PADMANABHAN, *supra* note 7, at 29.
[23] *See id.*

Further, under almost all BITs/IIAs, the state has no authority to go to arbitration to collect damages from an investor that does not carry out its obligations under an investment agreement.[24] Most of the time, it is the investor who is able to initiate the renegotiation of the contract when they face problems. A World Bank study of renegotiation of infrastructure investment agreements in Latin America found that more than half of renegotiations have been initiated by investors, not by the host nation.[25]

One good instance of this was in the Aguas Argentinas case (Aguas Argentina S.A. Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. The Argentina Republic, IICSID Case ARB/03/17) involving water for Buenos Aires, which was heard at the ICSID. In the past, Suez and other investors in this project had initiated renegotiations to change the terms to be more favourable to them. The government had no international rights to enforce the terms of its original contract when faced with investor demands. On the other hand, when the Argentine financial crisis struck and the government was under pressure to renegotiate, the lead investor filed for arbitration to enforce the most recent version of its agreement.

ii. <u>Indonesia</u>

Following the Asian currency crisis, two US investors in Indonesia were given awards by arbitrators that showed little sympathy for the need for relief (*Karaha Bodas Company* v. *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 2000).[26] With the collapse of the Indonesian currency, the government– and the state-owned Power Company – had tried to renegotiate contracts for unfinished power plants that would have produced electricity thought not to be needed in the subsequent deep recession and which required its purchase at prices that were up to six times in local currency what had been originally negotiated. It would have been political suicide for the government to authorize such price increases.[27]

Many investors renegotiated their arrangements. Some, however, refused and turned to arbitration. Arbitrators, with little attention to the collapsing economy in Indonesia, awarded investors not only what they had invested in the projects

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[24] *Id.*

[25] SORNARAJAH, *supra* note 18.

[26] *Karaha Bodas Company LLC* v. *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara and PT. PLN (Persero)*, ad hoc arbitration under UNCITRAL rules, Final award of (18 Dec., 2000).

[27] PADMANABHAN, *supra* note 7, at 26.

to date – a sensible base award- but also a substantial portion of the net present value of 30 years of future earnings.[28]

iv. Venezuela

President Carlos Andrés Pérez, opened up Venezuela to FDI in the early 1990's. Pérez's presidency came to halt on grounds of corruption accusations, which began after his presidency undertook a major reform in the country that has been called 'neo-liberal.' Among the most relevant aspects of such reform were: (i) privatisation of the country's public companies, including a national airline, the national phone company, and different electricity companies; (ii) liberalisation of the interest rates, which, until then, were fixed by the Ministry of Finance and (iii) an increase in the price of gas.[29]

These reforms proved to be very unpopular. After Pérez's removal, the head of the Venezuelan Congress, Ramón J. Velásquez, served for the remainder of the presidential term. In the 1993 elections, former President Rafael Caldera was elected for a second term in office. During Caldera's second presidency, Venezuela experienced a rapid downward economic spiral. The government's response included the continuation of several of the unpopular economic measures adopted by Pérez. Among the measures implemented in the framework of a program called Agenda Venezuela, were: liberalisation of interest rates, raising the price of fuel, devaluation of the currency, imposition of a foreign currency exchange control regime, and further opening of the oil sector to FDI, through continuation of a program called the Apertura Petrolera (Oil Opening).[30]

However, the social-economic and legal scenario radically changed in Venezuela after the December 1998 elections, when Chávez gained power. The arrival of a former insurrectionist in power, four years after being condoned by the incumbent President Caldera, drastically halted the free-market measures implemented by the past governments. When President Chávez took office in February 1998, he promised a major reform of the National Constitution, and the installation of a new economic system. In 1999, a new Constitution was passed by a national constituent assembly. The Chávez administration gradually implemented major legal reforms, including enactment of a new Hydrocarbons Law in 2001. Such reforms gave momentum to major strikes and public manifestations of discontent, which resulted in the ousting of Chávez in April, 2002 for two days. Shortly after his return to power, Chávez became more drastic in the implementation of his programs. Finally in February 2005,

[28] Louis T.Wells, *Double Dipping in Arbitration Awards? An Economist Questions Damages Awarded to Karaha Bodas Company in Indonesia,* 19(4) ARB INT'L L 472 (2003).
[29] VINCENTELLI, *supra* note 1.
[30] VINCENTELLI, *supra* note 1, at 52.

President Chávez said for the first time that his programs and policies were all directed towards the "socialism of the 21st Century."[31]

The Chávez Administration announced the strict application of the Hydrocarbons Law of 2001 through the implementation of the programs Plena Soberanía Petrolera (Full Petroleum Sovereignty), and Siembra Petrolera (Planting Petroleum). These programs involved renegotiation of the oil contracts with private investors, and a consequent dramatic increase of the country's share in the profits. The Apertura Petrolera had died. Some investors resisted the mandated change (a.k.a., process of migration) from a private to a mixed corporate form, with a majority stake in the hands of the State. ExxonMobil and ConocoPhillips preferred to file a claim against Venezuela before ICSID during the last trimester of 2007, rather than accept the new terms.[32]

While announcing the arrival in Socialism to Venezuela, Chávez commenced a series of expropriations and nationalizations changing the panorama for foreign investors and FDI. The first expropriations were targeted at agricultural farms. Two of the highest-profile cases were Hato La Marqueseña and Hato El Charcote. The latter belonged to the Vestey Group, from the United Kingdom, who decided to take Venezuela before ICSID in 2006. Recently, other strategic industries have been targeted by the government, including: telecommunications, by the announcement of the de-privatization of the national phone company – CANTV-; electricity, by the announcement of the de- privatization of the Caracas' power company – Electricidad de Caracas-; and cement, by the announcement of the acquisition of the four largest cement companies (Andino, Caribe-Holcim, LaVega-Lafarge, and Vencemos-Cemex). These rationalizations have also resulted in two ICSID claims against Venezuela.[33]

Venezuela has settled four of the six cases already concluded before ICSID. The only two cases that have reached an arbitral award did not involve large amounts. Recently, Venezuela has taken some measures that are unfriendly towards ICSID arbitration, directly targeted to potential claims that may arise out of the recent expropriations and nationalizations. Aside from the hostile political discourse against ICSID, the two most important "anti-arbitration" steps taken by the government are the denunciation of the Venezuela-Netherlands BIT, and the Supreme Tribunal's Decision number 1541 of October 17, 2008. Yet, it remains to be seen what will be the effects of these "anti- arbitration" measures in the other four cases against Venezuela currently outstanding before ICSID, and in any other potential claim that may be filed in the near future.[34]

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[31] *See id.*
[32] VINCENTELLI, *supra* note 1, at 53.
[33] *Id.* at 54.
[34] *Id.* at 55.

One of the crucial aspects is the process through which deals are struck by foreign investors in developing countries. Reflections on these deals suggest corruption or incompetence, or both, on the part of government officials. This is mostly due to the relative political instability in developing nations apart from a few. New governments tend to overrule agreements and treaties signed by previous government leading to disputes. This puts host state under more pressure as failure to meet treaty obligations will eventually result in the tribunal favouring the investor. Though arbitration panels have concluded that an agreement was unfair to the host country because there were kickbacks paid, such awards are seldom made. The standards of proof to prove corruption has also been set so high that very few governments have been able to produce convincing evidence. A good example of this was the Indonesian electric power cases where in all the three power projects that went to arbitration, members of government officials' families or military organizations (in a country with a military-backed government at the time) had received shares in the projects for no obvious contributions – money, skills or market access.[35]The arbitrators did not look in to these factors at all. As a result, contracts that are unfair to the host government are enforced. Thus, developing countries would be forced to pay up even on what they reasonably view to be "odious agreements" which had been signed by previous corrupt or inefficient governments. This onerous legacy and liability would continue to persist on the countries' governments.

Moreover, investor-state arbitration has been infamous for attracting calumny regarding arbitrators' integrity. Arbitrators tend to favour the claimant- investor in order to increase prospects of reappointment.[36] ICSID arbitrations receive most of the slander in this regard. This perceived apprehension on behalf of the host state, on the bias of the arbitrators, also makes investment arbitration an unfavourable option. These contentions and perceived bias apprehensions have been also offset by the number of decisions of tribunals that have been in favour of the host states.

V. Future Possibilities for dispute resolution

The apprehensions (not exhaustive) of the host state for trusting investment arbitration have been put forward. A few possible options for settling investment disputes are discussed hereunder.

A. Multilateral Investment Treaty

The current fragmented international investment regime shows the degree of complexity and confusion of the system, with many contracting parties, some

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[35] PADMANABHAN, *supra* note 7, at 30.
[36] VAN HARTEN, *supra* note 8, at 4.

bilateral, others regional or even multilateral, as we have seen in the case of WTO Agreements. This fragmented regime may encourage regulatory competition among the various models of international investment agreements. This fragmentation of the international investment regime may also create an incentive for treaty shopping by those foreign investors who seek protection even in situations where their country has not concluded or ratified investment agreements that offer the same level of protection as those achieved in other countries.[37]

The proliferation of investor-state arbitrations is evidence of the fact that, for the time being, bilateral and regional governance of investment via BITs and investment chapters of FTAs will be the prevailing means of governing FDI. That said, so much investor-state arbitration is causing issues of conflicting arbitral awards and forum shopping. All of this would be solved with the creation of a stable, non-discriminatory multilateral investment treaty. Hence, it is desirable to create a multilateral investment treaty.[38]

Furthermore, as analysed above, environmental and labour standards – which until now have only been treated marginally in international investment agreements – are increasingly seen as inseparable from foreign investment and therefore, from a substantive point of view, it is key to ensure that they are incorporated in a future multilateral framework for investment. This will be even more justified as globalisation continues to be a reality that affects the social and environmental responsibility of foreign investors.[39]

One of the suggestions for the way forward has been a Multilateral Investment Treaty ("MIT"). This was brought about in the year 2001 during the Doha negotiating round of the WTO. This treaty was strongly opposed by many of the developing countries including BRIC for the fear of losing control to adjudicate matters in their domestic courts.

A comprehensive multilateral framework for investment would serve as a template for a new generation of bilateral and regional investment treaties. It would help to reduce transaction costs and enhance the economic benefits of FDI. Regarding the design of such a multilateral framework for investment, the WTO has the opportunity to encapsulate years of development of an international framework for investment in the first truly multilateral agreement for investment. Such an agreement in the WTO context would not replace current bilateral and regional investment regulatory regimes, but could clarify

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[37] Rafael Leal-Arcas, *The Multilateralization of International Investment Law,* 35(1) N.C.J. INT'L L. & COM. REG. 105, 919 (2009).
[38] *Id.*
[39] *Id.*

the relationship among the GATS, the TRIMs Agreement, and BITs. Although the success of this project remains unknown, much work has already been inherited via the BITs, the GATS, the NAFTA, the Energy Charter Treaty, the TRIMs Agreement, and the failed MAI. The WTO has the chance to build upon these experiences.[40]

Though MIT was opposed the first time, there is lot of open space that can be explored. Issues brought by the developing countries can be researched and a better adjudication process can be brought about. The *ratione materiae* for adjudication can be clearly defined. The MIT could also propose an investment court for settlement of disputes of a defined nature. Hence, the scope for a Multilateral Investment Treaty still exists.

B. International Investment Court

There is also a case for an international investment court. One of the chief proponents of this argument is Gus van Harten. This argument is presented relative to existing arrangements that use a treaty-based arbitration mechanism to resolve investment disputes between states and investors.[41]

This argument presents a narrow central distinction between judges and arbitrators: the secure tenure of the former and the insecure tenure (case-by-case appointment) of the latter. This orientation of the argument leads by implication to the assertion that there is something wanting in terms of the independence and impartiality of arbitrators in the existing arrangements based on investment treaty arbitration. Given this, the present case is meant to respond to a critical flaw in an existing arrangement for international adjudication by elaborating upon an alternative.[42]

It should be made clear from the outset that apparent bias in investment treaty arbitration is just that: it is a reasonable suspicion of bias (not actual bias) arising from structural failings of arbitration when used to determine matters of public law. The critique of investment treaty arbitration should thus not be taken as a condemnation of anyone involved in investment arbitration; there are many jurists, lawyers, academics, and business people of skill and integrity who sit as arbitrators and whose reputation is not sullied by an objective critique of the structure of the system and, in particular, its lack of objective guarantees of independence and impartiality. The difficulty is that the current structure of investment treaty arbitration casts a pall over all awards, and all legal interpretations, that emerge from the system in spite of the

[40] *Id.*
[41] VAN HARTEN, *supra* note 8, at 4.
[42] *Id.*

experience, qualifications, integrity, etc. of the arbitrators, for reasons quite unique to this system and not to others where arbitration is used.[43]

There is a possibility of other alternatives that could be better at providing impartial and independent awards. This system could also take into account various stakeholders including countries, governments, investors, and even other systems that rely properly on arbitration to resolve disputes, especially commercial arbitration. The clearest alternative to the present arrangement is to establish an international investment court.

One of the prime bases of this argument is that International Investment Law is a subject matter of Public International Law and hence investment treaty arbitration is a form of public law adjudication in which the meaning of public law is resolved finally by adjudication. Second, for this reason, it should be evaluated according to standards that apply historically in public law. Third, the current system's failure to satisfy these standards, especially security of tenure, calls for an institutional arrangement that does satisfy them. Lastly, various counter-arguments that have been offered or that might be offered in opposition to an international investment court, founded on the principle of security of tenure in public law adjudication, do not warrant maintaining investment treaty arbitration as an alternative to such a court. For this reason, States should be encouraged to establish an international investment court in accordance with well-known principles of judicial decision- making in public law.[44]

The argument remains grounded in the theoretical distinction between the use of arbitration to resolve regulatory disputes and its use to resolve commercial or other private disputes. There are powerful criticisms of public-private distinctions from various perspectives and elucidate specific differences in casting the major types of adjudication, while acknowledging the possibility that the distinction may leave gray areas or be simply inappropriate in some circumstances. The public- private distinction rests in turn on a concept of the state as sovereign.

The concept of state as sovereign has received some stick in the recent past. For purposes of a public adjudication system, the reference to sovereignty is as an instrument for identifying and analysing certain activities of states as activities that states alone are able to engage in; for example, the passage of general rules accepted as binding in society and ultimately enforceable by the state's coercive power. Recognising this uniqueness of the state as sovereign, arising from its role as the representative of a political group

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[43] *Id.*
[44] *Id.* at 3.

associated with a particular territory, is useful in that it helps to reveal the distinctiveness of the relationship between the state and those who are subjected to or affected by regulatory activity of the state. As a concept, sovereignty is a means of social ordering that is important (though of course not beyond challenge or doubt) and that has sufficient probative value here, it is suggested, to enable an elaboration of the sorts of disputes that arise between investors and states and how those disputes differ from disputes arising between parties that are equally capable of possessing legal rights and obligations.[45]

An important aspect of disputes arising between a sovereign state and a foreign investor is that they are one-sided in that the powers and obligations of the entity on one side, the state, has a different set of powers and obligations in law than the entity on the other side, the investor. In some respects, the state will possess rights that private parties cannot hold such that the state will have powers that are specifically sovereign. In other respects, the state may be bound by sovereign obligations that a private party cannot possess or that a private party is in a unique position legally to avoid or abbreviate (by for example declaring bankruptcy). Where a dispute between a state and a private party occurs in relation to the state's exercise of these uniquely sovereign powers or its assumption of uniquely sovereign obligations, the dispute is described here as a 'regulatory dispute' and the adjudication of that dispute as a form of 'public law adjudication'.[46]

Thus, for present purposes, the public-private distinction entails recognition of the state as an entity with unique characteristics and of this concept of the state as the basis for public law as a category of study, enabling (even if roughly or with doubt) a distinction between instances in which adjudication is used to resolve regulatory disputes and instance in which it is used to resolve disputes originating in a reciprocal relationship between juridical equals.

The skeletal argument presented by Gus Van Harten is that there is (1) that investment treaty arbitration is a form of public law adjudication, (2) that it fails to satisfy standards of independence and impartiality in public law, and (3) that various reasons that might be offered to justify this are unsatisfactory in light of the importance of these standards. The next step would be to explore the various possibilities and prospects. An international investment court could be multilateral, regional, or bilateral. It could be a full court or an appellate body court that would hear appeals from decisions made in the first instance by arbitrators. It could be an autonomous entity or housed within

[45] *Id.* at 4.
[46] *Id.* at 5.

existing institutions. It could be staffed by dedicated judges or via a roster of jurists who sit on domestic courts. Ultimately, it is not so important to arrive at a specific design for an international investment court that suits all states or all commentators. Much more important is to recognise that the present system is flawed and call upon states to address this flaw. Ideally, states will act jointly to do so but to the extent that cooperation proves elusive, like-minded states should not hesitate to pursue alternatives to investment treaty arbitration with respect to their own treaty networks.

The critical point is that alternatives should be measured against the criteria of judging in public law, especially the related concepts of openness and independence. Without these standards being met, one does not have a system that depoliticizes disputes and subjects them to the rule of law, or that deserves the respect of all interested parties, above all developing states. At present, when Argentina or Ecuador or the Czech Republic is unsuccessful in investment treaty arbitration, its government and people have justifiable reason to reject the result as unfair, the process as structured unfairly against the host state, and the award as inferior in legitimacy to that of a court decision.

There is clearly an important role for arbitration in contexts outside of public law, where the concerns elaborated here are much less pertinent. There is also a need for international adjudication to address concerns arising from domestic regulation of foreign investment in a global economy and the threat of arbitrary or discriminatory treatment by host governments. In this respect, it would be beneficial for investors in general, as well as states, to establish a system that is widely regarded to be free of perceived bias. And regardless of one's views about whether there is a sufficient basis for doubts about the integrity of decisions emanating from the current system, why risk the possibility of many believing this to be the case? There is a clear alternative that is achievable, with awareness and political will, and states should be encouraged to pursue it.[47]

VI. Conclusions: Twilight

In a globalised world, flow of capital cannot be stopped. But the flow of capital also has to be protected, measured and controlled. Investment arbitration seemed to be the answer to protect capital and also to provide the much need control that host countries needed over the capital. Investment arbitration appeared to fill the gap in the *Barcelona Traction* case. In that case, the ICJ held that a State could make a claim when investments by its nationals abroad were prejudicially affected in violation of the right of the State itself to have nationals enjoy certain standards of treatment previously agreed in a treaty or

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[47] *Id.* at 30.

special agreement ("diplomatic protection"). Yet, the common situation when no such treaty or special agreement existed, thereby covering the particular conflict, was that investors would be left unprotected.[48] Though conventions like ICSID try fill the lacunae left by the *Barcelona Traction* case,[49] they are incomplete Investment arbitrations appear to work well when the economy is growing, domestic institutions at host countries are transparent and corruption free and there is political will to honour international commitments. But when there is deficit in any of the conditions prescribed above, investment arbitration fails.

The alternatives to investment arbitration like Multilateral Investment Treaties and International Investment Court seem farfetched at this point, but not entirely impossible. Though there are various grievances within the present system of investment arbitration, this system is there to stay in the light of lack of alternatives. If the current system is tweaked a little, with a wholesome approach, taking all stakeholders into account, the system is there to say for some time.

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[48] VINCENTELLI, *supra* note 1, at 1.
[49] *Id.*

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