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Investor State Dispute Settlement (ISDS)* Parvesh Kumar¹**Abstract**

Investor State Dispute Settlement (ISDS) is very prevalent concept in the international investment law. Investor State Dispute Settlement is a mechanism which allows the investors to sue nation states for their alleged discriminatory practices. Investor State Dispute Settlement is not only related to international investment law but it's also an instrument of public international law. Investor State Dispute Settlement is not envisaged in any charter or convention, but it's often found in the bilateral investment treaties, international trade treaties or international investment agreements. There has been a rise in the disputes which are being raised under these treaties or agreements. Investor State Dispute Settlement has been criticized by various states while other have been in favor of this concept. This paper would be focusing on the Investor State Dispute Settlement and its implication on the nation states. The author would also be dealing with the India's stand on the Investor State Dispute Settlement and the reasons why India is not in favor of this. Author concludes that the Investor State Dispute Settlement is the upcoming concept for the protection of the investor investing in other nation state and what are the impacts of various treaties on India.

Keywords: Investor State Dispute Settlement, Bilateral Investment Treaties, Trans-Pacific Partnership.

Introduction

Investor-State Dispute settlement (ISDS) clauses are a very common feature in International Investment Agreements (IIA) and Bilateral Investment Treaties (BIT).² Investor State Dispute

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²Ling Ling He, Razeen Sapideen, 'Investor-State Arbitration under Bilateral Trade and Investment Agreements: Finding Rhythm in Inconsistent Drumbeats' [2013] 47 Journal of World Trade, 215, 215.

Settlement is a framework through which speculators can sue country states for supposed biased practices. ISDS is an instrument of open worldwide law and arrangements are contained in various two-sided venture bargains, in certain universal exchange settlements, for example, NAFTA and the proposed TPP and CETA understandings. There are various international investments agreements also where ISDS is also found, such as Energy Charter Treaty. Basically, what happens under ISDS is that when an investor from home state invests in host state and there is a violation of any right of the investor by the host state, then investor have the right to bring the matter before an arbitral tribunal, provided that the parties have agreed to ISDS. While ISDS is frequently connected with international arbitration under the principles of ICSID (the International Center for Settlement of Investment Disputes of the World Bank), it regularly happens under the protection of worldwide arbitral councils represented by various tenets or foundations, for example, the London Court of International Arbitration, the International Chamber of Commerce, the Hong Kong International Arbitration Center or the UNCITRAL Arbitration Rules.

Under customary international law a state can vindicate damage caused to its country by the host state by practicing strategic insurance, which may incorporate retorsion and additionally responses. Notwithstanding discretionary insurance and to abstain from falling back on coercive methods, states can and do build up specially appointed commissions and arbitral courts to mediate cases including treatment of outside nationals and their property by the host ("state-state-question settlement", SIDS). Prominent instances of this training are the Jay Treaty commissions, the Iran– United States Claims Tribunal and the American-Mexican Claims Commission. Be that as it may, these bargains were constrained to the treatment of remote speculators amid a past timeframe, though present day ISDS enables financial specialists to make claims against states as a rule and on an imminent premise Current Scenario

At present, the legal security of Foreign Direct Investment under public international law is ensured by a system of in excess of 2750 two-sided venture arrangements (BITs), Multilateral Investment Treaties, most strikingly the Energy Charter Treaty and number of Free Trade Agreements, for example, NAFTA containing a part on speculation insurance. The greater part of these bargains was marked by states in the late 1980s and mid-1990s, before the present blast of financial specialist asserts under the arrangements started in the late 1990s. Most of these lawful instruments gives remote financial specialists a substantive legitimate insurance

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(counting the privilege to "reasonable and impartial treatment", "full assurance and security", "free exchange of signified" and the privilege not to be straightforwardly or in a roundabout way confiscated without full remuneration) and access to ISDS for review against Host States for breaks of such insurance. A portion of these models are encircled in dubious terms, given broad watchfulness to mediators in their translation and application.

Quiet, just remote financial specialists can sue states under speculation arrangements, since states are the gatherings to the bargain, and no one but states can be held subject to pay harms for break of the settlement. States have no comparing appropriate to bring a unique case against an outside financial specialist under such settlements, again on the grounds that speculators are not gatherings to the arrangement and along these lines can't be in break of it. Along these lines, a ruling for the state implies that the state has not been arranged to pay, not that it has gotten any pay from the financial specialist, despite the fact that expenses can be granted against the speculator. A state can't "win" in ISDS in the way of an outside financial specialist - a state which wishes to sue a remote speculator does as such through its very own local courts, without the requirement for a settlement.

ISDS can't upset local laws (in contrast to the World Trade Organization) which disregard exchange understandings,³ however can concede money related harms to financial specialists unfavorably influenced by such laws.⁴ As per the Office of the United States Trade Representative, ISDS requires explicit settlement infringement, and does not enable organizations to sue exclusively over "lost benefits". Be that as it may, such infringement might be hard to predict, and the danger of over-the-top fines may cause a chilling impact which ends guideline or enactment in the open intrigue. Faultfinders likewise express that arrangements are composed with the goal that any enactment causing lost benefits is by definition a bargain infringement, rendering the contention invalid that just settlement infringement are liable to ISDS.⁵

³Kimberly Ann Elliot, *Assessing the Trans-Pacific Partnership, Volume 1: Market Access and Sectoral Issues*, Peterson Institute for International Economics, available at <https://piie.com/publications/piie-briefings/assessing-trans-pacific-partnership-volume-1-market-access-and-sectoral> (accessed on 16-04-2019)

⁴Claire Provost and Matt Kennard, *The Obscure Legal System that lets Corporation Sue Countries*, *The Guardian* (June 10th, 2015), available at <https://www.theguardian.com/business/2015/jun/10/obscure-legal-system-lets-corporations-sue-states-ttip-icsid> (accessed on 16-04-2019)

⁵Haley Sweetland Edwards, *Shadow Courts: The Tribunals that Rule Global Trade*, *Colombia Global Reports* (2016), Chapter: Introduction.

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What was the need for ISDS?

Before the Investor State Dispute Settlement appeared, the financial specialists had no place to go. They would need to go the residential courts which did not have the ward to choose such issues. The residential courts did not have the power and because of that the cases would go agitated. Something else, these cases would go to the State embrace of the case. This would occur with the assistance of conciliatory procedures or even with assistance of military power.⁶ Since it was unrealistic for the question to be settled by direct financial specialist state exchange, the entire procedure had turned out to be clumsy and awkward. The very foundation of Investor State Dispute Settlement can be named as a mix of advancement and association. This establishment endeavors to put a conclusion to the strain between the universal states with the goal that they would not need to depend on military power. It means to ensure and serve the potential financial specialist's interests with the goal that they a discussion to look for help on a worldwide dimension with regards to global venture arrangements.⁷

International Investment Agreements/Treaties

Bilateral Investment Treaties are international agreements between two economies that set forth binding rules on each government's treatment of investment from other economy.⁸ Trans-Pacific Partnership looks to make a free trade zone over the Pacific Rim. The gathering incorporates Brunei, Chile, New Zealand, Australia, USA, Mexico, Canada, Singapore, Malaysia, Peru, Vietnam, and Japan among its signatories.⁹ The basics of the ISDS component are contained in Chapter 9 of the TPP. First the ISDS component underscores the significance of straightforwardness in arbitral procedures; all reports concerning the discretion will be accessible to the overall population. Second, is the accommodation of amicus curiae petitions: worker's guilds, partners, NGOs and so on can submit briefs to the court without waiting be requested by either gathering to help the court. Non-debating parties, (for example, the investor's' home government) are additionally permitted to make entries to the board on the

⁶Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?*, Vanderbilt Journal of Transnational Law (2008), p. 780, available at SSRN: <http://ssrn.com/abstract=1070701> (accessed on 17-04-2019)

⁷Won-Mog Choi, "The present and future of the investor-state dispute settlement paradigm", Journal of Economic Law 10(3), pp. 725-747, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1152154 (accessed on 17-04-2019)

⁸Scott Miller and Gregory N. Hicks, *Investor-State Dispute Settlement – A Reality Check*, Center for Strategic & International Studies (January 2015), available at https://csis-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/publication/150116_Miller_InvestorStateDispute_Web.pdf (accessed on 15-04-2019)

⁹Mrigank Ranjan, *Considering the Investor-State Dispute Settlement Provisions under the Trans-Pacific Partnership*, Vivekananda International Foundation (2016), available at <https://www.vivekananda.org/>

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elucidation of the Agreement.

Third, an accentuation has been laid on the joint activity of both (or more) parties associated with assertion. Gatherings whenever can concede to the elucidation of the understanding that is authoritative on the councils. Fourth, time limits have been set up, where rejection of unimportant cases has been sped up and furthermore as far as possible amid which a speculator can realize a case has been constrained to 42 months from the date of real event or the learning of the event of the supposed break. Fifth, the questioning gatherings will almost certainly remark on the proposed prizes before their issuance and a component can be set up to test the reward. Ultimately, the gathering seeking after a case in the procedures must postpone their entitlement to start parallel procedures in an alternate discussion, (for example, ICSID).¹⁰

A striking case of ISDS, which has been in presence for two decades presently, is Chapter 11 of the North American Free Trade Agreement (NAFTA). NAFTA Chapter 11 permits speculators of one NAFTA party (Canada, United States or Mexico) to bring claims straightforwardly against the legislature of another NAFTA party before a global arbitral council. Since NAFTA Article 1121 postpones the nearby cures rule, speculators are not required to deplete neighborhood cures before recording Chapter 11 claims. While this reality has been abundantly scrutinized out in the open, defenders of ISDS will in general bring up that expedient question goals through ISDS is basic in current monetary situations and would be vanquished by including a few occasions of neighborhood cures. Then again, there is no other circumstance in global law where a private gathering can sue a state without demonstrating that the state's local courts are not free or dependable. The expulsion of the standard obligation to deplete neighborhood cures, where they are sensibly accessible, is professed to be a factor in the blast of venture bargain claims since the late 1990s, in spite of the fact that a progressively evident clarification is the blast in the quantity of two-sided organized commerce understandings since the breakdown of the multilateral WTO Doha round in the mid-2000s.

Financial specialists may start discretion against the NAFTA Party under the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL Rules") or under the Rules of the International Center for Settlement of Investment Disputes ("ICSID

¹⁰*Ibid.*

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Rules"). NAFTA Chapter 11 was the main example of an ISDS arrangement accepting far reaching open consideration, particularly in the United States in the wake of the Methanex case.¹¹

Opposition from the EU side to the US proposition to incorporate an ISDS proviso in the draft Transatlantic Trade and Investment Partnership Settlement was, for example, to make this component be relinquished in September 2015. In its place, the European Commission proposed a speculation court framework (ICS).¹² Not long subsequently, ICS was proclaimed unlawful by the German Association of Magistrates;¹³ however the Commission expelled the officers' judgment as dependent on a misconception. As far as it matters for its, the United States needs ISDS restored.¹⁴

India's Stand on ISDS

India have constantly been rejecting informal proposal made by Canada and EU various times. Proposal was towards a multilateral pact on investments at the World Trade Organization that would have an Investor-State Dispute Settlement (ISDS) mechanism built into it.¹⁵ India has never been in favor of multilateral treaty or agreement for ISDS. The reasons for which India has been rejecting this proposal are:

- It is only after all options for settling disputes between a sovereign government and a corporate in domestic courts have been exhausted do, we want to allow the issue to be taken up in international courts.
- It should be part of a bilateral agreement and not a multilateral agreement.
- The EU, in a bilateral meeting with India, also indicated that it would hold free trade talks with India only after concluding a new bilateral investment treaty (BIT) with India.
- India had asked all countries with which India has investment protection agreements, including the EU, to re-negotiate those pacts on the basis of the new

¹¹Methanex Corp. v. United States of America, State.gov. Retrieved 19 November 2014.

¹²Nikolaj Nielsen, *EU Proposes New Trade Court with US*, EUobserver (Sep 16, 2015), available at <https://euobserver.com/economic/130297> (accessed on 18-04-2019)

¹³Nikolaj Nielsen, *TTIP Investor Court Illegal, Say German Judges*, EUobserver (Feb 04, 2016), available at <https://euobserver.com/economic/132295> (accessed on 18-04-2016)

¹⁴Nikolaj Nielsen, *EU Defends TTIP Investor Court After German Backlash*, EUobserver (Feb 17, 2016), available at <https://euobserver.com/economic/132295> (accessed on 18-04-2019)

¹⁵Asparliament, *Indias' Stand on ISDS*, IAS Parliament (Jan 25, 2017), available at <http://www.iasparliament.com>

draft text of BIT.¹⁶

- India thought that multilateral trade agreement of the likes of TPP would increase the number of cases against India as India is considered soft target by investors.¹⁷
- India wants investors to sign India's new Bilateral Investment Treaty. This treaty is different from other BITs as it provides more transparency.

There are various pros and cons of the ISDS mechanism affecting India. Some of the pros are:

- This will ensure that there is fair and faster delivery of justice as the arbitral tribunal would be deciding the dispute. This will save time and money.
- The new BITs which are proposing have more transparency as all the details will be made available to prospective investors and also to general public when arbitration proceeding would be carried on.
- The preamble to the TPP ensures that the investors should take social responsibility.
- This will make investors more confident about investing in India as they would be having a proper forum that would deal with their issues.

Now, some of the cons are:

- The ISDS might at times be extra-constitutional which means that the host state might be sued by the investor even for the activities which are constitutional in the host state.
- The mechanism works for a suitably hierarchical system with sets of checks and balances. The difference between the powers of local bodies and govt might increase the lawsuits against the government.¹⁸
- ISDS mechanism might hurt the local companies as they might not be able to compete with the same.

This shows that ISDS mechanism have its own pros and cons and this might the Indian market as the companies might be afraid before taking investment if any provision or the law is against such investment. India has to have clear mind going ahead on this mechanism. The power is so vast which has been given in the hands of the investor that the investor has been trying to make the government work the way it wants. This system was created with the aim of bringing justice to the genuinely aggrieved investors but now this very aim seems to have disappeared in thin air or has taken a backseat in other words. If this continues which means

¹⁶ Ibid

¹⁷ Supra Note 9

¹⁸ Supra Note 9

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that if that if an investor is able to force the government to rule the law according to the whims and fancies of the investor, then this entire system would result in chaos.¹⁹

Conclusion

ISDS mechanism is prevailing in most of the parts of the world. However, India is still afraid from the multilateral investment agreements or treaties but to some extent are in favor of the bilateral treaties. ISDS mechanism is a subject of public international law, international investment law and also of international arbitration. In any case, the developing lawful modernity of investment dispute settlement likewise indicates a further fortifying of the standard of law at the worldwide dimension that should profit developing nations that come up short on the political and monetary intensity of developed countries. Besides, the expanded number of discretions may likewise spur creating host nations to improve household regulatory practices and laws so as to keep away from future debate; this would additionally reinforce the consistency and soundness of the legitimate system that the finish of IIAs should deliver in any case. I would like to end this paper with a hypothetical question. Given that India yearns towards being a manufacturing hub, which is characteristic given the high efficiency and modest work that is in bounty in the nation, is it monetarily practical for India to avoid multilateral FTAs of this sort?

¹⁹ Supra Note 4

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