



## ARBITRATION OF INVESTOR-STATE DISPUTE: HISTORY AND FUTURE STRATEGIES

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### INTRODUCTION

Arbitration in the international sale of goods has received a more significant deal of support than arbitration in other types of disputes and the success of arbitration in one area cannot be carried into other commercial activities. Neither can the success of arbitration in settlement of disputes between private traders belonging to different nations be brought into the area where a State entity is a party to the transaction from which the dispute arises. The entry of a State, either by itself or through its trading entity, into the picture, creates many complications.<sup>1</sup> The policy goals of the State become implicated in the dispute. If the State is a developing country, entrenched suspicions of international arbitration become accentuated. Such suspicions result from the fact that these States have seen international arbitration as a weighted-weight system in favor of the capital-exporting States. But despite such fears and distrust, all the investment treaties, i.e., the North American Free Trade Agreement<sup>2</sup>, the Energy Charter Treaty and a sizable number of the 1,800 or so existing bilateral investment treaties provide for arbitration without a contractual relationship between the parties to the dispute, or

arbitration without privity. By its request for arbitration, the investor consents to arbitration and the host state is deemed to have consented to arbitrate by virtue of accession to the treaty. This is nothing short of a reversal of the classical theory of arbitration, postulating that arbitration is the result of a contract.<sup>3</sup> Investment treaties are all anti-discrimination treaties that protect foreign investors from discriminatory measures taken by the host state that favor domestic investors.<sup>4</sup> This means that arbitral tribunals acting under these investment treaties will have to render decisions which possibly condemn actions or policies of the host State. Despite the particular nature of these arbitral systems which require neither a contractual relationship between the parties nor an arbitration clause, the arbitral proceedings are governed by rules drawn from the commercial arbitration world: UNCITRAL, ICSID, ICC and the Stockholm Chamber of Commerce Arbitration Rules, and parties are usually free to appoint anyone as an arbitrator, irrespective of particular qualifications or nationalities. A quite remarkable end-of-century development in the arbitral world is the multiplication of arbitration systems for investor grievances under investment treaties, be they multilateral, regional or bilateral.

### The Historical Development of Arbitration of Investment Disputes

International commercial arbitration, particularly in the field of foreign investment contracts, developed principally in the latter

<sup>1</sup> Lionel M. Summers, Arbitration and Latin America, 3 Cal. W. L.J. 1, 6-7 (2001).

<sup>2</sup> North American Free Trade Agreement (NAFTA), Dec. 8, 1993, 107 Stat. 2057, 32 I.L.M. 289 hereinafter NAFTA.

<sup>3</sup> Charles H. Brower, II, Investor-State Disputes Under NAFTA: A Tale of Fear and Equilibrium, 29 Pepp. L. Rev. 43 (2001)

<sup>4</sup> Libyan American Oil Co (LIAMCO) v. Libya, 482 F. Supp. 1175 (D.D.C. 1980)



part of the twentieth century when colonialism was receding, and the use of gunboat diplomacy to settle investment disputes was unwise in the context of the nationalistic movements sweeping Asia and Africa and illegal due to the development of a norm against the use of force. Rules of investment protection through State responsibility for injuries to aliens did exist but these, too, were being subjected to challenge.<sup>5</sup> Hence, it was necessary to turn to some other form of protection of international investment contracts. The means for it was provided by international arbitration. Investor nations were seen as controlling the arbitral process in a manner that allowed it to be used only as a tool to extract concessions from the host country. In state-to-state proceedings, only through their governments that private investors took part vicariously. Latin American states have often been forced to bring disputes to European sovereigns such as Britain's Queen Victoria, Russia's Tsar Alexander II, Germany's Kaiser Wilhelm II and Belgium's King Leopold I, whose predispositions and sympathies have not always inspired trust among developing countries.<sup>6</sup> Not surprisingly, host states reacted to what they perceived their

economies as foreign control. Invoking principles articulated by the Argentine jurist Carlos Calvo of the 19th century, Latin American countries came to demand similar treatment for foreign and domestic investors.<sup>7</sup> This effectively eliminated as options both diplomatic protection<sup>8</sup> and arbitration. In 1974 the Calvo doctrine was pushed further in the so-called "New International Economic Order" adopted by the United Nations General Assembly in an attempt (unsuccessful, as history has shown) to require host state courts rather than international arbitrators to determine the measure of compensation for expropriated property.<sup>9</sup> Since arbitration was conceived as a method of investment protection, its early rules were designed to achieve that result and favour the foreign investor. Even its ardent supporters do not deny that in its formation, the system of international commercial arbitration was biased against the developing States. Thus, an advocate of arbitration concedes that "it may be true that in the beginning of this century, and until the 1950s, arbitrations conducted by various international tribunals or commissions evidenced bias against developing countries."<sup>10</sup>

<sup>5</sup> S. N. Guha-Roy, *Is the Law of State Responsibility for Injuries to Aliens a Part of Universal International Law?* (1969) 55 A.J.I.L. 562. Latin American countries had consistently rejected the rules on State responsibility.

<sup>6</sup> Lionel M. Summers, *Arbitration and Latin America*, 3 Cal. W. L.J. 1, 6-7 (2001).

<sup>7</sup> Kurt Lipstein, *The Place of the Calvo Clause in International Law*, 1945 Brit. Y.B. Int'l L. 130, 145 (concluding that "before international tribunals the Calvo Clause is ineffective").

<sup>8</sup> Diplomatic protection involves state-to-state claims in which a foreign investor invokes his country's intervention against the host state.

<sup>9</sup> Art. 2(2)(c) of The Charter of Economic Rights and Duties of States, G.A. Res. 3281, U.N. GAOR, 29th

Sess., Supp. (No. 1) 3, 5, U.N. Doc. A/9 559 (1974), provides that compensation should be "appropriate" as determined under "the domestic law of the nationalizing State and by its tribunals." See William W. Park, *Legal Issues in the Third World's Economic Development*, 61 B.U. L. Rev. 1321 (1981). This principle was rejected in *Texaco Overseas Petroleum Co. (TOPCO)/California Asiatic Oil Co. (CALASIATIC) v. Libya*, Int'l Arbitral Tribunal, Award on the Merits (Jan. 19, 1977), 17 I.L.M. 1 (1978).

<sup>10</sup> J. Paulsson, *Third World Participation in International Investment Arbitration* (1987) 2 ICSID Rev. 19.



NAFTA brings investment arbitration to a full circle, to a time more than two centuries ago when the US was primarily a debtor nation. In 1794, the so-called "Jay Treaty" (named for its American negotiator John Jay, later U.S. Supreme Court Chief Justice) gave British creditors the right to arbitrate alleged despoliation claims by American citizens and residents.<sup>11</sup>

More recently, however, multinational corporations have required African and Latin American nations to arbitrate investment disputes, either through arbitration clauses in custom-made concession agreements or through bilateral and multilateral investment treaties.<sup>12</sup> Such arbitration has often implied natural resources and industrial infrastructure elements no less critical to those countries economic sovereignty and well-being than the NAFTA cases that have caused controversy in the United States and Canada.<sup>13</sup>

Ultimately, an increasing number of capital importing countries came to realize that their self-interest was served by agreeing to arbitrate investment disputes. Equally as significant, arbitration became a fairer process.<sup>14</sup> Representatives from developing countries began to participate more actively in international arbitral institutions such as

the International Chamber of Commerce (ICC), International Centre for Settlement of Investment Disputes (ICSID), and the London Court of International Arbitration (LCIA), as well as in the formulation of new procedural rules such as those of the United Nations Commission on International Trade Law (UNCITRAL). Developing countries also came to realize the greater the risk, the higher the cost of investment. Untrustworthy enforcement mechanisms tend to chill cross-border economic cooperation to the detriment of those countries that depend most on foreign capital for development. To the extent that arbitration promotes respect for implicit bargains between investor and host country, it came to commend itself to developing countries as a matter of sound international economic policy.<sup>15</sup>

#### The Scope for International Arbitration of State Contracts

International commercial arbitration of sales transactions has been generally successful and is a feature of international commerce. But the success and methods in that area cannot and should not be transposed into the area of international arbitration of disputes arising from contracts between States or State entities and foreign corporations. As regards the latter type of arbitration, it has been shown that two competing sets of norms are

<sup>11</sup> Treaty of Amity, Commerce and Navigation, Nov. 19, 1794, U.S.-Gr. Brit., 8 Stat. 116. The treaty addressed difficulties arising from the 1783 Treaty of Paris ending the American Revolution. Under Article 6, damages for British creditors were to be determined by five commissioners. Two were appointed by the British and two by the United States, with the fifth chosen unanimously by the others, in default of which selection would be by lot from between two candidates, one proposed by each side.

<sup>12</sup> Thomas W. Wälde, 'Treaties and Regulatory Risk in Infrastructure Investment' in (2000) 34 Journal of World Trade 1, 13 and 46.

<sup>13</sup> Henri C. Alvarez, Arbitration Under the North American Free Trade Agreement, 16 Arb Int'l 393, 412 (No. 4, 2000);

<sup>14</sup> Charles H. Brower, II, Investor-State Disputes Under NAFTA: A Tale of Fear and Equilibrium, 29 Pepp. L. Rev. 43 (2001); Charles H. Brower, II, Structure, Legitimacy and NAFTA's Investment Chapter, 36 Vand. J. Trans'n'l L. 37 (2003).

<sup>15</sup> William W. Park, Duty and Discretion in International Arbitration, 93 Am. J. Int'l L. 805 (1999).



at work. On the one hand, there is the theory of internationalization which gives complete scope for international arbitration in this area. On the other hand, there are the competing norms which will considerably emasculate the range for international arbitration of foreign investment contracts. Within the competing standards described in the last section, two significant strands can be detected both of which are opposed to the theory of internationalization of foreign investment contracts and the rules that are included in the formulation of that theory.

#### A] Calvo Clause

The first strand is the universalization of the Calvo clause, which denies any scope for the international arbitration of investment disputes. This strand is most evident in the natural resources sector where doctrines, like the doctrine of permanent sovereignty over natural resources, support the view that domestic laws alone should control the process of exploitation of resources. Depending on trends within each natural resources sector, the host State will generally have sufficient bargaining power to ensure that it has control over the investment.<sup>16</sup> But it must be conceded that as much as the bargaining power of the State may be used to obtain the application of the State's law to certain types of transactions, there are other types of transactions where the foreign party may be able to obtain the implementation of an external system of law or even its home State's law.<sup>17</sup> Transnational loans made by banks are the best example of this. Still, these

transactions may be distinguished on the basis that the loans are usually located in the home State or the State of the head offices of the banks which lend and are unlike foreign investment transactions where the operations are firmly situated in the territory of the host State. Arbitral clauses are seldom used in such transactions simply because the courts of the home State could provide more effective remedies. Such transactions fall outside the ambit of this work. But their existence indicates that the theory of internationalization, which postulates the existence of a uniform body of principles which applies to all transnational transactions, is simply wrong, as the rules applicable to different transactions differ widely based upon their nature and the relative bargaining strengths of the parties.<sup>18</sup>

#### B] Conflict of Sources

The second strand does not deny the relevance of international principles of international arbitration. It takes the position that in circumstances where international arbitration is permissible, such arbitration should discard doctrines on which the theory of internationalization was built and apply the evolving principles of the international law of development.<sup>19</sup> Here, the conflict is of various types. It is a conflict of sources. If doctrines like the sanctity of property, which supports internationalization, can be passed off as general principles of law, so can doctrines of merchantability and consumer protection also be regarded as such general principles. It is a conflict of policies.<sup>20</sup>

<sup>16</sup> E. S. Schanze, *Mining Ventures in Developing Countries*, 11 *Am. Rev. Int'l Arb.* 116 (1981)

<sup>17</sup> W. Peter, *Arbitration and Renegotiation of International Investment Agreements* 27 *Yale J. Int'l L.* 141 (1986).

<sup>18</sup> O. Schachter, *Sharing the World's Resources* 31 *Cornell Int'l L.J.* 599 (1977).

<sup>19</sup> J. Paulsson, *Third World Participation in International Investment Arbitration* (1987) 2 *ICSID Rev.* 19.

<sup>20</sup> S. Roy Chowdhury, *Reasonable Expectations of the Foreign Investor and the Host State* 18 *Int'l Arb.* 231 (2002).



Internationalization is supported by the policy that the security of investment will facilitate the global flow of foreign investments and thereby, economic development. The competing norms reject this view of this system. They rest on the notion that the host State does not have equal knowledge or bargaining power in the face of multinational corporations and that this inequality has to be redressed.<sup>21</sup> Both theories will continue to be articulated as long as there is scope for international arbitration of foreign investment disputes. But, unlike the approach of internationalization and the set of norms associated with it, the principles drawn from the international law of development form the basis on which some accommodation could be reached between the developed countries which export capital and developing countries which receive it.<sup>22</sup> For this reason, the future of international arbitration lies in stressing this strand that is emerging so that international arbitration can escape from the shroud of suspicion of bias that now surrounds it. But it must also be recognized that investment in the natural resources sector falls outside the scope of international arbitration simply because of the existence of the peremptory norm of permanent sovereignty over natural resources which itself is a principle of the international law of development. Many countries put this proposition beyond issue by including it in their constitutions or their investment codes.

### Arbitration by ICSID

There were several early efforts to provide for institutional arbitration of investment disputes<sup>23</sup>, but these efforts failed, partly because they were seen as “serving the sinister ends of Western neo-imperialism”.<sup>24</sup> The Convention which set up ICSID, however, was drafted with the participation of many developing countries. A basic premise behind the Convention was that foreign investment flows were beneficial to the developing countries and that it was necessary to devise measures of protection of such investment to promote such flows. Many developing States subscribed to this economic theory at the time of the drafting of the Convention and became parties to the Convention.<sup>25</sup> There were also other advantages, like the obtaining of loans from international financial institutions, which flowed from participation in the Convention. Ratification of the Convention by several States may, however, not be an indication of the success of the Convention. For the jurisdiction of the ICSID to be engaged, the State parties should agree to the incorporation of a clause consenting to the arbitration of disputes by the Centre in the investment agreement itself.

The Convention was regarded as an innovative approach to the problem as a genuine effort was made to make its provisions acceptable to developing States.<sup>26</sup>

<sup>21</sup> M. Sornarajah, Pursuit of Nationalised Property 14 Am. U. Int'l L. Rev. 659 (1986)

<sup>22</sup> P. Kahn, Law of Development and Arbitral Tribunals 11 J. Int'l Arb. 19 (1994)

<sup>23</sup> The Abs. Shawcross Convention on which see G. Schwarzenberger. The Abs. Shawcross Draft Convention on Investments Abroad (1961) 14 Current Legal Problems 213; O.E.C.D., Draft Convention on the Protection of Foreign Property, for text see (1968) I.L.M. 117.

<sup>24</sup> The Abs. Shawcross Convention on which see G. Schwarzenberger. The Abs. Shawcross Draft Convention on Investments Abroad (1961) 14 Current Legal Problems 213; O.E.C.D., Draft Convention on the Protection of Foreign Property, for text see (1968) I.L.M. 117.

<sup>25</sup> The Convention predates the New International Economic Order and concern with multinationals.

<sup>26</sup> J. Cherian, Investment Contracts and Arbitration 47 Int'l & Comp. L.Q. 747 (1998), P. F. Sutherland, The



Its enforcement provisions, making the award enforceable as if it were a judgment of the High Court of each contracting State, are attractive.<sup>27</sup> The classic instance of the compromise in the Convention is Article 42(1) of the Convention, which deals with the law applicable to the transaction. It begins by stating the well-accepted principle that parties have complete autonomy as to the choice of law. In the absence of a choice-of-law provision, the Convention takes the bold step of directing that the national law of the State party shall apply but proceeds to make the issue contentious by requiring that “such rules of international law as may be applicable” should also be applied.<sup>28</sup>

According to Broches, the reference to international law in Article 42(1) has the following effect:

“The tribunal will first look at the law of the host State, and that will in the first instance, be applied to the merits of the dispute. Then the result will be tested against international law. That process will not involve the confirmation or the denial of the host State’s law but may result in not applying it where that law or action is taken under that law, violates international law. In that sense, international law is hierarchically superior to national law under Article 42(1).”

Such an interpretation may be unfortunate in that it could be used to keep alive the theory of internationalization. Indeed, it has been so used by some ICSID tribunals.<sup>29</sup> If the interpretation is correct, the concession made to the national law of the host State is illusory, and the Article is a mere ploy to ensure that unwary developing States will become parties to the Convention. That should not be the interpretation of the Article. Instead, the Article must be taken as conceding the primacy of national law.<sup>30</sup> Such an understanding is more appropriate at present because the Convention was drafted at the time when the theory of internationalization did have some hold, and the competing norms relating to national control of foreign investment contained in the New International Economic Order and the international law of development had not come to be articulated. At present, the divergence of opinion as to the position in international law is clear.<sup>31</sup> While proponents of the theory of internationalization may claim that there are international law principles which apply to foreign investment, both the conservative position represented by the *Serbian Loan Case* and the position taken in Article 2(2)C of the Charter of Economic Rights and Duties of States is that international law merely refers the dispute back for settlement according to the rules of

World Bank Convention on the Settlement of Investment Disputes (1979) 28 I.C.L.Q. 367; ICSID, History of the Convention (1968).

<sup>27</sup> On these features of the Convention, see A. Broches, Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution (1987) 2 ICSID Rev. 287. Another novel feature is the suspension of diplomatic protection provided by Article 27.

<sup>28</sup> See the view of Professor Aramburu-Menchacha that proper international investment arbitration can only take place in the context of a convention and that

at present only ICSID qualifies as a truly international arbitral Institution. A. A. Aramburu-Menchacha in I.C.C., Sixty Years of I.C.C. Arbitration (1984)

<sup>29</sup> G. R. Delaume, ICSID and the Transnational Financial Community (1986) 1 ICSID Rev. 237; O. A. Ruiz del Rio, Arbitration Clauses in International Loans (1987) 4 J. Int. Arb. 3, 45.

<sup>30</sup> J. Paulsson, May a State Invoke its Internal Law to Repudiate Consent to International Commercial Arbitration? (1986) 2 Arb. Int'l 90.

<sup>31</sup> G. Wetter, The International Arbitral Process, 85 Nw. U. L. Rev. 993 (1991)



the national laws of the host State. Given this position, an ICSID tribunal will be seen as taking a partial role if it subscribes to the view stated by Broches and adopts the set of principles involved in the theory of internationalization.<sup>32</sup> This will be disastrous for the future course of ICSID arbitration. The safer route is to develop the other strand contained in the competing norms which will be to recognize the rules associated with the international law of development and balance them with regulations necessary to confer protection on investment. By doing so, the ICSID tribunal will enable the forging of new rules acceptable to both parties and contribute to the development of a genuinely acceptable body of international law principles. The advantage is that it will enable the recognition of the contract itself as governed by a collection of rules of international law thus assuring the foreign party a measure of protection he may not have had if national laws were to govern the transaction exclusively. Since norms of justice are central to the ideas behind the international law of development, adequate norms to reflect the interests of foreign investment protection could be built into this evolving body of rules. Because they address concerns flowing from the unequal bargaining strength of the parties, the norms, for which the developing States were responsible, will be accepted by the developing states. *Klockner v. Cameroon*<sup>33</sup>

stands out as the ICSID award, which points the way to the future direction ICSID arbitration should take. If instead, it clings on to the notion of internationalization and the antiquated body of principles which flow from it, an opportunity will be lost for creating a new body of universally accepted principles of investment dispute resolution through international arbitration.

### Bilateral Investment Treaties

Many bilateral treaties provide for arbitration of investment disputes. Given the present uncertainties as to the international law rules on foreign investment protection, States have turned to bilateral arrangements in order to give adequate protection for their overseas investments. The majority view seems to be that these treaties reinforce “traditional” principles of investment laws.<sup>34</sup> This view does not seem to be accurate, for if “traditional” principles of international law do exist, there should be no need for such a flurry of treaty activity merely to reiterate such principles. Furthermore, a study of the statements of the types of protection given by the various treaties shows such divergence on specific issues that they evidence a lack of uniform principles both in international law as well as in the treaties themselves.<sup>35</sup> Hence, conclusions drawn based on the observation that “not a month has gone by since 1974 without at least one bilateral economic treaty being signed,” or that the significance of the

<sup>32</sup> Abul F.M. Maniruzzaman, Internationalization of Foreign Investment Agreements: Some Fundamental Issues of International Law, 1 J. World Investment 293 (2000)

<sup>33</sup> (1985) 10 Y.C. A. 71

<sup>34</sup> F. A. Mann British Treaties for the Promotion and Protection of Investments 52 B. Y. I. L. 241(1982) at p. 249; for the literature in the area, see G. Gallins, Bilateral Investment Protection Treaties 2 JI. of Energy & Natural Resources Law 77(1984); G. Aksent,

The Case for Bilateral Investment Treaties in Southwest Foundation, Private Investors Abroad 17 Arb. Int'l 235, 247 (1981); K. Kunzer, Developing a Model Bilateral Investment Treaty 15 Law & Policy in Intl. Bus. 273 (1983); J. E. Pattison. The United States–Egypt Bilateral Investment Treaty: A prototype for Future Negotiations (1933) 16 Cornell I.L.J. 305

<sup>35</sup> M. Sornarajah, State Responsibility and Bilateral Investment Treaties (1986) 20 J. W. T. L. 1, p. 79



treaties lies in the creation of uniform principles, are not based on a careful examination of what the different texts of these treaties are designed to achieve. The treaties do no more than ensuring that, as between the parties, specific rules of protection shall apply to the foreign investment flows between each other. The United States, which has rigid standards in its treaty, has been unsuccessful in negotiating many such treaties.<sup>36</sup> Many of the treaties make references to arbitration by ICSID but, as Broches has pointed out, the mere fact that there are references in these treaties to ICSID does not give jurisdiction over individual disputes to an ICSID tribunal.<sup>37</sup> Whether an investment agreement can result in a prior agreement to ICSID arbitration will depend on the words used in the treaty. Broches makes a distinction between four types of clauses in bilateral agreements relating to arbitration. The first type merely states that the dispute “shall, upon agreement by both parties, be submitted for arbitration by the Centre”<sup>38</sup>. Such a clause does not constitute consent to arbitration. It requires a further specific agreement in each dispute referring the dispute to the Centre for an ICSID tribunal to have jurisdiction. The second type which requires “sympathetic consideration to a request to conciliation or arbitration by the Centre”<sup>39</sup> does not amount to consent but may imply “an obligation not to withhold consent unreasonably”. The third type of clause requires the host State “to assent to any demand on the part of the national to submit for conciliation or arbitration” any dispute

arising from the investment.<sup>40</sup> Refusal to assent may create an international obligation, but the clause itself cannot create jurisdiction in an ICSID tribunal. The fourth type of clause creates jurisdiction in the Centre by giving consent in anticipation of the dispute. This clause, which is usually found in the treaties concluded by the United Kingdom, reads: “Each Contracting Party hereby consents to submit to the Centre any dispute arising between that Contracting State and a national company of the other Contracting State.”<sup>41</sup> Such a clause may create jurisdiction in the ICSID. Still, opinion differs as to whether the effect of the clause automatically creates jurisdiction so that the foreign corporation can have direct access to the ICSID. The treaty clause would not protect the corporation unless it included a corresponding provision in its contract with the State.<sup>42</sup>

The caution adopted in the case of the only type of clause in bilateral investment treaties creates considerable doubt as to the utility of their arbitration provisions. In-State practice there does not seem to be a great concern with these provisions. Thus, the Federal Republic of Germany, which has concluded the most number of such treaties, does not insist on general consent to ICSID arbitration. There is a similar ambivalence in French practice. Only the treaties of the United States insist on a provision akin to the fourth clause. But the United States has not had much success in

<sup>36</sup> M.S. Bergman, *Bilateral Investment Protection Treaty An Examination of the Evolution of the U.S. Prototype Treaty* (1983) 16 N. Y. U. J. Intl. & P. 1

<sup>37</sup> A. Broches, *Bilateral Investment Treaties and Arbitration of Investment Disputes*, 2 Arb. Int'l 274 (1986).

<sup>38</sup> e.g. Sweden–Malaysia treaty (1979).

<sup>39</sup> e.g. Netherlands–Kenya treaty (1978).

<sup>40</sup> e.g. Netherlands–Indonesia treaty (1968).

<sup>41</sup> e.g. United Kingdom–Bangladesh treaty (1980).

<sup>42</sup> Voss, *The Protection and Promotion of European Private Investment in Developing Countries* 18 C. M. L. R. 363 (1981)



negotiating its model treaty.<sup>43</sup> The euphoria about bilateral investment treaties providing enormous scope for arbitration of investment disputes is much misplaced. Since, in most instances, they merely reinforce the ICSID Convention, the same remarks made to ICSID arbitration apply to arbitration indicated by these treaties.<sup>44</sup> But, where arbitration supported by the existence of bilateral investment treaties takes place, the award rendered is supported by international obligations created by the treaty and failure to accept the award may result in international liability on the part of the State. The failure of a State party to appear before or participate in the arbitration also may result in the liability of the State. To that extent, arbitration of disputes arising from State contracts which are protected by such treaties is more meaningful than arbitration which is not protected by such agreements.

### CONCLUSION

International commercial arbitration is the most resorted and the most successful dispute settlement mechanisms in the present world of trade and commerce. It has its own inbuilt advantages over other modes of dispute settlement. But investment disputes cannot be wholly equated with other commercial transactions making investment arbitration different from other commercial arbitration. The main point of difference is the involvement of state or states in investment arbitration. When states are involved problem is bound to be complicated because the powers and duties of state stand on a different platform in comparison to that of individuals. The state is the protector of its subjects and has no personal interest but

represents collective interest. The suspicion of bias towards the investor associated with arbitration strikes at the roots of the institution and the confidence of parties is greatly affected. The internationalization of investment dispute resolution by arbitration is vehemently opposed on the grounds that the state has permanent sovereignty over natural resources and a privately constituted tribunal cannot decide on it, also on the grounds of inequality existing between the investor and the host state. But time and practice across the globe show that parties have got over this suspicion of bias and most treaties incorporate arbitration clauses. The significant chunk of investment arbitration in the world takes place under the auspices of ICSID, or bilateral agreements concluded between the parties. Even though investment arbitration could not match up to the success and glory of other international commercial arbitration, it is still the best mode of investment dispute resolution and in years to come it will emerge as the sure winner.

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<sup>43</sup> D. A. Cody, United States Bilateral Treaty; Egypt and Panama Ga. J.I. L., 491 (1983)

<sup>44</sup> J. E. Pattison. The United States–Egypt Bilateral Investment Treaty: A prototype for Future Negotiations (1933) 16 Cornell I.L.J. 305