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THE DIFFERNENCE BETWEEN INTERNATIONAL ARBITRATION AND INTERNATIONAL INVESTMENT ARBITATION AND THE NEED OF SANCTIONS IN INTERNATIONAL INVESTMENT ARBITRATION

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ABSTRACT

The Primary focus of the paper is that whether there is a need for any sought of sanctions required for investor state arbitration in cases where the parties to the arbitration fails to comply to the arbitration award. The particular questions have arisen because of the fact that there has been a steady increase in the number of dispute between states and foreign investors. It is also possible to know more about the extent to which these arbitral awards are rendered by various arbitral tribunals.[2]

Research Questions :

(1) Whether there is a difference between International Arbitration and International Investment Arbitration.?
(2) Whether there is any law governing the procedure and framework with respect to the International investment arbitration.
(3) Does International Investment Arbitration needs Sanctions?

Research Methodology

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The method of research will be totally based on analytical research and secondary data. Various secondary sources such as books and internet websites are being referred for broadening the horizons for understanding the concepts of Arbitration.

INTRODUCTION

Does International Investment Arbitration Needs Sanctions

There is although no exact proof of compliance issue and depends on the facts and circumstances of each and every case.The very system of international investment arbitration is one for the compensation for the damages. But not compliance through withdrawal of a measure or putting an end to certain acts or lack of action on the part of the state.[3] The damages or the losses for the violation of investment treaties fulfil a purpose of compensation for investor, and the international investment system is not one of the exemplary or punitive damages. Moreover there are different routes to go through like annulment, set aside and enforcement which do not reflect the decisions by the parties to ISDS dispute not to enforce or to abide by the final award. Further this can be seen as a very good plan to first exhaust the full range of remedies which are available to challenge an award in the absence of an appeal system. Therefore states have used this strategy and has become very good in their defence and therefore take all the possible routes to challenge or delay an enforcement. Such recourse is the very essence of the whole process and should not been interpreted in any light as wrongful on the part of the party using the same.[4]

But the situation took a upside down when a situation arise in which the U.S President had announced that he had suspended all the trade benefits under the general system of general preferences program for its neighbour state Argentina for the reason that the country has failed to pay the compensation which were ordered by two awards passed against the United States by the ICSID tribunals. This came in the context of the international treaty relationship and the trade retaliation as it is considered to be an international trading system.

[3]See also Susan D. Franck, The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public Law Through Inconsistent Decisions, 73 FordhamL. Rev. 1521, 1530-32 (2005) [hereinafter Franck, imacy Crisis

[4]See Anthea Roberts, Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States, 104 A.J.I.L. 179, 225 (2010

For the above mentioned reasons it is very appropriate to argue that there is no need for any sanctions system in the ISDS case and therefore not warranted in the current settings. Some of the arguments which can be set out to prove the above fact are as follows the very first and the basic reason is the economic fairness comparing with the domestic investors.

In the modern world foreign investors enjoy a very protective regime be it targeted investors laws, codes, incentives under the domestic framework and specific state contract. These commitments by the host state a very friendly and a protective environment for foreign operators in the host countries seeking to attract their investment.[5]

Another important point is that a network of bilateral investment treaties and free trade agreement, foreign investors, are singled out as subject of the protection which has been guaranteed by the access to the international arbitration which is very exorbitant. And so some extent derogatory to the principle of international law.[6]

On the other hand domestic investors do not enjoy such level of freedom. If the international community comes up with the idea of sanctions in the cases of non-enforcement of arbitral awards, then in those cases of non-enforcement the later economic actors would be discriminated against. This would disturb fair competition amongst the foreign and domestic investors. The cases are even more sensitive in the cases where there exists a situation of crisis of the host state economy. Further the system of international investment law is one of compensation for awarding damages. i.e. the remedy can be considered as the reparation and monetary compensation for damages, but not compliances through withdrawal of a measure, or putting an end to certain acts or lack of action on the part of the state.

Therefore the damages for the violation of investment treaties fulfil a compensatory purpose for an investor and also in the international investment system cannot be one of the exemplary or punitive damages or sanctions for the wrong doing by the state. Another argument which exist is that Investment treaty remedies are basically not meant to mandate a certain type of set behaviour: for example,they cannot be requested the withdrawal of a law or changes in the

[5] See generally David Schneiderman, Judiáal Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcomes , 30 N.W. J. Int'l L. & Bus. 383 (2010.

[6]See Charles N. Brower et al., Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?, 9 Chi. J. Int'l L. 471, 497-98 (2009).

Constitution or national legislation of state. The enforcement of arbitral award which remains contrary to the domestic laws or the constitution in the views of the host start are important points to consider and remember.

If one thinks about the international trading system. Article 22 (2) of the DSU provides for the possible suspension of the concessions or other obligation as well as retaliation or even cross retaliation, in other agreement in order to force member states to comply with the WTO rules and achieve the overall purpose of the WTO agreement namely maintaining trade balance and also the free flow of goods and services around the globe. The WTO system is not based on the compensation for an aggrieved party but is designed to force the member'sstate to follow the rules. But the same set of rules is not applicable in the area of international trade and international investment. An example was set in the case of High Fructose Corn Syrup NAFTA case. Mexico had not prevailed with the use of countermeasures against the U.S. when the cases were brought under Chapter 11, the compensatory damages chapter of NAFTA. A second set of reasons is that here is unified international investment international law system with a single set of rules and a single dispute settlement system, one of the reasons is that international investment law system is highly atomized and made up a myriad of bilateral, regional and multilateral rules. There are at least two or three sets of rules and institutions that investors can turn to if they want to see their disputes with host states settled through international arbitration.

There is no multilateral investment contract or any sought of frame work which is been facilitated with a single unique international court or arbitration institution that could implement a sanction or a punishment system, similar to what we have seen with the WTO.[7] In short, there is no authority today that could authorize recourse to sanctions, and it would be dangerous. There was a question which arise in the united states which says that whether having a sanctions system built into the ISDS system patterned on the international trading system would actually avoid today situation where a state is been retaliating in another area of economic relations. Retaliation is possible when obligations stem from a single agreement. But this is not the case here. What the main key between the source of an obligation and the system is concept of compliance..Encourage it could be contended that under universal speculation discretion the

[7]*See, e.g.,* G. John Ikenberry& Anne-Marie Slaughter, Forging a World of Liberty Under Law: U.S. National Security in the 21st Century (2006).

outside financial specialists are not totally free and without plan of action if there should arise an occurrence of non-instalment by the condition of the money related remuneration that has been granted by an arbitral tribunal.

The basic arrangement itself may accommodate a method for authorizing an arbitral honour. A few speculation arrangements accommodate the likelihood of a state-state discretion on account of a resistance by the state. In the ICSID Convention: A Commentary referring to Gilbert Guillaume, makes plainly "refusal to consent to the honour and dependence on State resistance prompts the restoration of the privilege of conciliatory assurance under article 27(1) and may prompt the accommodation of the question to the International court of Justice as per Art. 64." So back to strategic assurance and embrace of the claim.

THE DIFFERNCE BETWEEN INTERNATIONAL COMMERICAL ARBITRATION AND INTERNATIONAL INVESTMENT ARBITRATION

The paper will now shift to the focus of commercial arbitration. It is a well established fact that the commercial arbitration has been for many tradition operating both at the domestic and also at the international level. Investment Arbitration have also been existed for some time as of now, as seen from the older cases. The complete concept came in the year 1959, when the first Bilateral investment treaties come into the picture., and when the world bank initiated the ICID Convention in 1965. Now a days the investment arbitration is by now chosen as one of the most common dispute settlement mechanism in thousands of treaties and investment contracts and leads to hundreds of cases per year in practice between state and foreign enterprises.[8]

In the commercial arbitration differences in the legal culture become particularly relevant because of the fact that most institutional arbitration rules provides as Article 21.2 of the ICC Rules, that the tribunal has to take into account the usage of the trade usages which is different from different countries, and regions of the world . On the other side, major differences in the legal culture has been playing an important role in the government and other state institutions have, mainly due to two reasons one been the constitutional framework or due to their

[8] See Jack L. Goldsmith & Eric A. Posner, The Limits of International Law 7, 87 (2005).

application in practice in a range of different states what some might consider a democracy western style at one end or the dictatorial system at the other.[9]

For the commercial arbitration purpose the only relevant treaty is the New York convention, which deals with the recognition and enforcement of foreign arbitral awards, while the other traditional instrument plays no important role today[10] On the other side investment arbitration ,treaties which concerns the public international law have been provided with the fundamental framework particularly bilateral instrument as more than 2000s BIT, and multilateralinstrument as the ICSID Convention ,the energy charter treaty, and religion instruments such as NAFTA and CAFTA. As far the European law is considered it is applicable for both the commercial and investment arbitration through different ways. In case of commercial arbitrations, quite frequently the issue of mandatory rules such as antitrust law and their qualification as public policy becomes relevant. As far the investment arbitration is concerned the Lisbon Treaty regarding its conflicts with existing BITs has initiated a wide range of issues and discussions and the future competence to conclude new bits by EU Member States. National law plays different role, in the commercial arbitration procedurally its mandatory provisions rule, the arbitrations at the place of arbitration, and a national substantive law is in the great majority of cases what the tribunal has to apply. In speculation assertion, national law assumes an alternate part. Procedurally its compulsory arrangements are of significance if the mediation isn't administered by bargains, for example, ICSID or NAFTA, however been under guidelines of non-administrative establishments, for example, the ICC or the LCIA which, thus, need to regard the obligatory law at the place of intervention.[11]

SELECTION OF THE ARBITRATORS

The advantage of arbitration is that the parties can select judges of their own choices and confidence. In investment arbitration the situation is different. The usual issues of such disputes are limited are much more limited, since the bilateral as well as multilateral investment protection treaties contain very similar provision dealing with expropriation, fair and equitable

[9]Bankoviç and Others v. Belgium and 16 Other Contracting States, App. no. 52207/00, 2001– XII E.H.R.R. 65.
[10] Supra note 7
[11] Supra note 7.

treatment. In perspective of this, the normal skill required from authorities is one of open worldwide law and especially its application to such insurance.

Therefore many arbitration of the commercial arbitration do not want to be chosen by the parties in the investment arbitration and therefore vice versa there are many expert of international law selected for international arbitration are not active in commercial arbitration. However there are kind of group of arbitration who do both kind of arbitration. Both in the commercial and investment arbitration the procedure differ per institution. One of the significant explanations behind the gatherings to concur on assertion is that they have an impact to choose judges of their own certainty. This cannot be replaced by an institution which cannot have the same detailed knowledge of all relevant circumstances of the particular case at hand at the beginning of the procedure.On the off chance that the gatherings or the gathering designated judges can't concur on the decision of an administrator of the tribunal, this arrangement is the errand of the arbitral establishments.[12]Both in business and speculation mediation, the individual methodology vary per foundation. There is no compelling reason to portray them in our specific situation. It can be said that in the regular phase of business assertion, the pool from which the director can be chosen isn't constrained by a particular practise and is comparatively wider in the ambit.

JURISDICTION

Jurisdiction is an issue which is different in the commercial and investment arbitration. In commercial arbitration jurisdictional dispute are very less frequent. They mostly concern the scope of the contractual arbitration clause, even if the non-signatories are a group of companies or behind a general contractor. Further in an investment arbitration there is a much wider scope of jurisdictional issue and have frequently objections which may result in a bifurcation of the procedure. The consent of the parties to arbitration is expressed in a treaty of pubic international law such as a BIT or the ICSID convention. Thereby, general principles of treaty interpretation, particularly the Vienna Convention[13], will become relevant in much detail. The state's consent to arbitration may depend on the interpretation of:

– Whether an 'investment' existed;

[12]*See* Chester Brown, A Common Law of International Adjudication 55 (2007).
[13] See Chester Brown, A Common Law of International Adjudication 55 (2007).

–or, then again whether the Claimant is a national of the charged home state, regularly as an organization which has been made there by the mother organization for the main reason this new home state has a BIT with the respondent state;

– or whether a national of that home state really owns and/or controls the allegedly expropriated company. [14]

CONFIDENTIAL OR TRANSPARENCY

A traditional reason often mentioned for the choice of commercial arbitration over court procedures is that arbitration is confidential. And this seems still to be an important consideration for many private enterprises today. For investment arbitration, we have a mixed picture in that context. The traditional instruments such as the ICSID Convention and most BITs say little or nothing on whether the proceedings and awards shall be treated as confidential. But nowadays, today, verylittle confidentiality is left in investment arbitration.While ICSID still needs and regularly asks for the agreement of the parties for a publication of the award in a case, irrespective of the answer of the parties, almost all awards are published. The same is true for awards in investment arbitrations under the other rulesmentioned such as those of the ICC, the LCIA or national arbitral institutions. They are distributed in one of the many wellsprings of data we now have on the web for the most part without a distinguishing proof of the source. One can simply guess that social occasions, law workplaces or individuals give the information, since they consider that this serves their interests some way or another. Regardless of the legitimate circumstance, great reasons can be and have been submitted for a more noteworthy straightforwardness in venture assertion, since it concerns interests of a state who thusly speaks to people and society.The claims of their constituency and non-governmental groups to be informed and be able to provide an input is thus understandable.The latest advance toward this path is the better and brighter US Model BIT simply distributed in April of this current year. While it gives the gatherings of the discretion the decision between ICSID, it's Additional Facility Rules, and the UNCITRAL Rules or the tenets of some other arbitral organization on

[14] *Ibid.*

which the gatherings concur, for these it gives in its Article 29 that all dedications, minutes, requests, hearings, and honours of the tribunal might be interested in people in general. [15]

CONCLUSION

Household assertion laws in numerous nations be they mechanical, developing and underdeveloped nations, still offer much opportunity to get better. This may especially be so for those nations which just as of late have turned out to be real players in worldwide exchange. Building up the law, be that as it may, isn't sufficient. As we see shape the training in numerous locales, the considerably more troublesome errand will be to influence the national court frameworks to fit for actualizing the New York Convention and managing present day intervention.[16]

The institutional standards utilized for business assertion have, in general interims, been rethought and amended keeping in mind the end goal to consider new encounters from their down to earth usage. This procedure will and should proceedas to the process of mediation, a portion of the feedback as of late will proceed and change the situation. By and by, one of the discussions in such manner is the OECD Roundtable on Freedom of Investment with a particular concentrate on speculator state debate settlement.

This field is considerably more presented to the national and worldwide political condition which changes as often as possible changes of government Business and Investment Arbitration: How Different are they Today or, on the other hand of the political structures in states will, for justifiable reasons, prompt clashes with remote speculators and afterward to question and mediations. States will keep on need and attempt to draw in remote speculation. They might be fruitful in such endeavours if they give some legitimate security to such speculations including the alternative for the settlement of question. In any case, then again, as in business discretion, parties who have been on the losing side in various interventions will see the blame in the framework instead of in their own particular direct.

[15]Seehttp://www.arbitrationicca.org/media/4/20743713842706/media113644853030910bckstiegel_lalive_lectureoffprint.pdf.
[16]*Ibid.*

SUGGESTIONS

The investment arbitration agreement may also provide for an *ad hoc* arbitration (the absence of an arbitration institution that administrates the proceedings). Typically, such *ad hoc* arbitrations are governed by the **UNCITRAL Arbitration Rules**. It is said that UNCITRAL *ad hoc* arbitrations are less expensive than ICSID proceedings, although statistics simply do not support this statement.

Frequently, investors are provided a choice of the arbitral institution they would like to entrust with administering their dispute. This choice depends upon the terms of the arbitration agreement upon which the dispute is brought.

- **Duration of Investment Arbitrations**

The average investment arbitration takes slightly over three years. According to the ICSID's statistics, in 2015 the average arbitration (between the date of an arbitral tribunal's constitution to its conclusion) lasted "on average, 39 months." The longest continuing ICSID dispute in history continued over a span of nineteen years, but this was truly exceptional and involved the constitution of two separate arbitral tribunals.

There are no appeals of investment arbitration awards, although the arbitral rules under which they are brought do provide limited grounds for the annulment or setting aside of an arbitral award.

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

– the Tribunal was not properly constituted;
– the Tribunal has manifestly exceeded its powers;
– there was corruption on the part of a member of the Tribunal;
– there has been a serious departure from a fundamental rule of procedure; or
– that the award has failed to state the reasons on which it is based.

- **How the cost of Investment Arbitration is borne out**

The significant cost of investment arbitration prevents many foreign investors from relying upon it. According to one review, average claimant costs were USD 4,437,000 and average respondent costs were USD 4,559,000 for investment arbitrations, while average tribunal costs were USD 746,000.

The parties must cover the expenses of the arbitral tribunal, the arbitration institution, the experts' fees and the legal fees of the counsels. Some specialized arbitration law firms, called "arbitration boutiques", provide legal services for investment arbitrations at more competitive legal fees, which can reduce the overall cost. Aceris is an example of such a boutique.

If a party has difficulties covering the costs of the arbitration, there is also a possibility to obtain funding from Third Party Funders, who provide funds to pursue investment arbitrations in return for a stake in the financial outcome of the case. Obtaining third-party funding is a difficult and

time-intensive process, however, and it is only provided for what appear to be the strongest cases.

- The Arbitral Tribunal

The selection of an arbitral tribunal for an investment arbitration is perhaps the most critical step in the process. Some arbitrators are known for adopting "*pro-State*" or "*pro-investor*" positions, and many appear repeatedly in investment arbitrations.

Investment arbitrators have been decried as a "*small, secret, clubby*" group of "*grand old men*", but more women arbitrators are appearing in investment arbitrations today. While Parties in ICSID arbitrations are free to choose from arbitrators from the ICSID Panel of Arbitrators, they are not required to do so, and Parties are generally free to choose whomever they wish, subject to certain requirements regarding nationality and qualifications.

Enforcement of Investment Arbitration Awards

The ICSID Convention provides the rules for the enforcement of international investment awards that host States are bound to respect (Articles 53 to 55 of the ICSID Convention). According to the ICSID Convention, "*Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State."*

If the host State is not a party to the ICSID Convention, then enforcement of the award is carried out in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. According to this Convention the awards of international arbitrators can be enforced in over 150 countries (approximately 3/4 of countries on earth).

- Success Rate of Investment Arbitration

According to studies, Claimants win some or all of their claims approximately 41% of the time. Respondents (States) win approximately 59% of the time, with roughly one-quarter of claims being dismissed for lack of jurisdiction.

Whereas the average claim is for just under USD 500 million, the average award is for only USD 76 million, suggesting that many initial claims are greatly exaggerated. Purely speculative claims have a very low chance of success.

The successful party recovers a portion of their costs in nearly half of all cases, as costs may follow the event in investment arbitration.

- Discuss on the Future of Investment Arbitration

Under the head of jurisdiction-

1. Discuss the Corfu Channel case

For Sanctions in International Investment Arbitration

- **Discuss recent Investment Disputes and the following points tersely**

It seems that there are no investment arbitration cases involving the recent wave of conclusions of BITs by Iran. There have been a few cases related to investment before the Revolution involving arbitration. For instance, in National Iranian Oil Company v. Ashland Oil Inc. the respondent allegedly refused to pay the crude oil it received due to possible turmoil following the Iranian Revolution. Subsequently, the respondent did not participate in an arbitration proceeding in Iran (the place of arbitration according to the contract) due to the potential dangers for Americans. The National Iranian Oil Company then sought to compel arbitration in Mississippi arguing that commercial impracticability necessitated change of the arbitration forum.

In National Iranian Oil Co. v. Israel the Court of Appeals of Paris agreed with the Iran National Oil Company that the claim was admissible in French Courts due to the denial of justice even when there was no reference to French law in the contract. It also declared that if either party failed to appoint an arbitrator by a certain date it would select one on behalf of the defaulting party.Iran is currently engaged in a controversial dispute over a gas contract it concluded with United Arab Emirates (the "UAE") involving allegations of bribery and corruption. Due to the investment of Iranian nationals in the UAE, Iran and the UAE have not concluded a bilateral investment treaty. The famous 25-year Crescent contract has been concluded with the UAE for the exportation of gas after five years of negotiation finishing in 2001.

According to the contract, Iran is obligated to export 500 million cubic meters of gas to the UAE. The low contract price along with its long-term commitment persuaded the Iranian parliament to enter the scene and call the contract against Iran's national interest. Further investigation of Iran's parliament showed signs of bribery and corruption. In the meantime, Crescent petitioned the International Court of Arbitration claiming breach of contract by Iran. This case is one of the highly politicized investment disputes involving Iran in recent years and as a result, public information is sparse. Based on the available information, if the deal was reached through fraud and bribery, Iran. Article 1493 of France's nouveau code de procedure provides: "The arbitration agreement may, directly or by reference to arbitration rules, appoint the arbitrator or arbitrators or provide a mechanism for their appointment. If a difficulty arises in the constitution of the arbitral tribunal in an arbitration which takes place in France or which the parties have agreed shall be governed by French Procedural law, the most diligent party may, in the absence of a clause to the contrary, apply to the president of the Tribunal de Grande Instance of Paris in accordance with procedures of Article 1457." -petroleum might be able to cancel the contract. In all other cases, Iran cannot invoke its internal law prohibition on the public sector arbitration clause to justify its breach. Recently and after a long legal battle, Iran successfully challenged some of the US Courts decisions rendered against Iran, as violation of the Algiers Accords in Iran-US Claims Tribunal. The Tribunal awarded Iran for expenses it reasonably incurred in the

litigations in the United States.For clarifications you can **refer to- FORDHAM INTERNATIONAL LAW JOURNAL [Vol. 37:1731]**

	Individual Sanctions	**General Sanctions**
National Sanctions	Broad Review (no justification for breach)	Broad Review (no justification for breach)
International Sanctions (United Nations Security Council)	Limited Review (correspondence of regulation imposing sanctions)	Broad Review (legality of sanctions as applied)

This table briefly describes the different scenarios when international sanctions enter into the scene of international arbitration and the potential outcomes. The first relevant distinction is whether the source of an international sanction at question is internal or international. Invoking internal laws is generally not a valid argument in the context of international disputes. In other words, one party cannot resort to itsinternal laws for justification of its breach of international obligations (**reference-**George A. Bermann, The "Gateway" Problem in International Commercial Arbitration, YALE J. INT'L L. 1 (2012) (explaining that internal laws can have some effects on "gateway" issues such as consent to international arbitration).

The status of international sanctions imposed by the Security Council is more challenging. If the Security Council specifically names an individual, a company or an entity, the arbitral tribunal does not have much room to review. In this case, similar to the Kadi and Bosphorus cases, the arbitral tribunal could review the internal regulation ratified pursuant to the UN Security Council Resolution. The review in this scenario is restricted to ensuring that the internal regulation corresponds fully with the Security Council Resolution. On the other hand, if the Security Council Resolution has a broad language, as commonly is the case, the arbitral tribunal could hear arguments regarding the application of the Resolution. Borrowing from US Constitutional language, in this scenario the arbitral tribunal can review the UN sanctions "as applied" in the case before it. Evidently it does not have the power to rule on the "legality" (similar to "constitutionality" in US constitutional law) of international sanctions. (**reference**- Euclid v. Ambler Realty, 272 U.S. 365, 395 (1926) ("It is true that when, if ever, the provisions set forth in the ordinance in tedious and minute detail, come to be concretely applied to particular premises to particular conditions, or to be considered in connection with specific complaints, some of them, or even many of them, may be found to be clearly arbitrary and unreasonable."). See generally Nectow v. City of Cambridge, 277 U.S. 183 (1928).