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Research Article

Legal and Economic Implications of International Trade Agreements on Investments Dispute Resolution

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Abstract

International trade agreements are major avenues for facilitating global economic growth, ensuring smooth supply chain management across the globe, and coordination of international relations among other social and economic activities among nations. However, such agreements and activities thereof are inevitably prone to disagreements and violations of the guiding principles. Multilateral trade agreements, Bilateral Investment Treaties, and even Regional Trade Agreements often involve countries with economic, political, and legal backgrounds or trends that predisposes them to occasional disharmony with the provisions. It is the inevitability of the disharmony and disputes in the international trade agreements that moved commercial regulators like the World Trade Organization to come up with legal and alternative mechanisms for resolving the disputes. Nevertheless, the trade agreements are equally unique in terms of their provisions with potential impacts on arbitration as an established alternative mechanism for solving international investment disputes. This study sought to examine the possible economic and legal implications of international trade agreements, including bilateral investment treaties and regional trade agreements on arbitration of international investment disputes. It was informed by three specific objectives namely, analysis of the provisions and mechanisms of international trade agreements, assessing the effects of the international trade agreements on the legal framework governing investment dispute resolution, and examination of the economic consequences of investment dispute resolution under international trade agreements. Systematic review of relevant literature alongside case analysis were used as the research methods for the realization of the aforementioned objectives. Both bilateral investment treaties and regional trade agreements were establish to contain substantial and binding provisions most of which recognize and support arbitration in the resolution of their investment disputes. Multiple cases emanating from various trade agreements were established to have been settled through arbitral tribunals. Therefore, the study concludes by noting that different provisions of the international trade agreements have worked towards strengthening the position of arbitration as a mechanism of solving international investment disputes.

Keywords

International Trade Agreements, Legal, Economic, Investments, Dispute Resolution, Systematic Review, Bilateral Investment Treaties

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1. Introduction

The resolution of investment disputes in the context of international business has become an increasingly complex and critical area of study. With the proliferation of international trade agreements, such as bilateral investment treaties (BITs) and regional trade agreements, the legal and economic implications of these agreements on the resolution of investment disputes have garnered significant attention. This post-doctoral research examined the interplay between international trade agreements and the resolution of investment disputes through arbitration. By examining specific cases and analyzing the impact of these agreements on the legal framework and economic outcomes, this study sought to contribute to a deeper understanding of the complex dynamics at the intersection of international business law and economics. The findings of this research provide valuable insights for policymakers, international organizations, and businesses operating in a globalized business environment.

2. Objectives of the Study

The primary objective of this study was to examine the legal and economic implications of international trade agreements on the resolution of investment disputes through arbitration. In pursuit of this overarching objective, the following specific objectives are addressed:

1) To analyze the provisions and mechanisms of international trade agreements, such as BITs and regional trade agreements, that impacts the resolution of investment disputes.
2) To investigate the effects of these international trade agreements on the legal framework governing investment dispute resolution, including the jurisdiction of arbitral tribunals, the choice of applicable law, and the enforceability of arbitral awards.
3) To assess the economic consequences of investment dispute resolution under international trade agreements, including the costs of arbitration, the length of proceedings, and the impact on investment flows and investor confidence.

3. Methodology

This research adopted a qualitative research approach, utilizing a case study and systematic literature review approaches to examine the legal and economic implications of international trade agreements on the resolution of investment disputes. The research involved a comprehensive analysis of relevant legal texts, including BITs, regional trade agreements, and international arbitration rules. To conduct an in-depth investigation, Eiser Infrastructure Ltd. vs. Kingdom of Spain investment dispute case was identified and analyzed.

By employing a rigorous and multidisciplinary research methodology, this study aimed to provide valuable insights into the legal and economic implications of international trade agreements on the resolution of investment disputes. The findings contribute to academic knowledge, inform policy decisions, and assist businesses in navigating the complexities of international investment dispute resolution in a rapidly evolving globalized business environment.

4. Systematic Literature Review

4.1. Provisions and Mechanisms of International Trade Agreements

International trade agreements are described as formal agreements between two or more countries or regions to facilitate and regulate trade between them [16]. While acknowledging the increasing popularity of Trade Agreements (TAs), the author notes that such agreements tend to cover various aspects of trade, including tariffs, quotas, intellectual property rights, investment, and other trade-related issues. The main aim of the international trade agreements, as stipulated by the provisions of World Trade Organization (WTO) is regulation of international economic integration while allowing the concerned countries to realize unrestricted trade among them.

The trade agreements are viewed as possible economic and legal pitfalls in two main dimensions. The first risks of the TAs is that the agreements have the capacity to overrule and impede full implementation of the WTO rules while the second risk is that the agreements are possible avenues for diverting international trade rather than creating the trade as envisioned by the WTO [7]. However, formulators of the agreements endeavor to overcome such pitfalls through facilitative and binding legal provisions. The involved countries, economic entities, and individual investors are required to abide by agreements' provisions and shun commercial malpractices as defined by the relevant provisions of the WTO, RTAs, and BITs [9].

International trade agreements, including Bilateral Investment Treaties (BITs) and Regional Trade Agreements (RTAs), typically contain a variety of provisions and mechanisms [27]. These agreements are negotiated between countries to facilitate and regulate trade and investment. Some of the common provisions and mechanisms found in such agreements include Investor-State Dispute Settlement (ISDS), National Treatment and Most-Favored-Nation (MFN) Treatment, Fair and Equitable Treatment (FET), Expropriation and Compensation, Free Transfer of Funds, Entry and Establishment, Environmental and Social Standards, and Intellectual Property Protection among others.

1) Investor-State Dispute Settlement (ISDS)

According to notable scholars, Investor-State Dispute Settlement (ISDS) is a dispute resolution mechanism aimed at protecting a firm from a member state against unfair treatment by the host state [11]. For instance, Trans-Pacific Partnership (TPP) includes mechanisms for Investor-State Dispute Settlement (ISDS), allowing investors to bring claims against host states for treaty violations. Arbitration is a common method for resolving these disputes. By giving an example of the Transatlantic Trade and Investment Partnership (TTIP), Abbot and his colleagues explains that ISDS is a legal provision in most of the international investment agreements, including BITs where an investor is granted the leeway of calling for arbitration with a state should dispute arise in the course of an international investment [1]. The ISDS mechanism is notably most active in the EU than any other region in the globe. It is a provision that seems to strengthen the position of arbitration as a mechanism for settling international investment disputes. Statistics shows that 37% of the 90 cases filed by investors against host states between 2003 and 2013 were successfully settled through arbitral tribunal [21].

2) National Treatment and Most-Favored-Nation (MFN) Treatment:

BITs as well as other international trade agreements, pioneered by the GATT, endeavor to eliminate discrimination in the international investment arena through the provisions of National treatment and Most Favored Nation treatment [23].

The BITs often include provisions ensuring that foreign investors are treated no less favorably than domestic investors (national treatment) and not less favorably than investors from any third country (MFN treatment).

3) Fair and Equitable Treatment (FET):

Most of the BITs, and even multilateral investment agreements often include the FET provisions to ensure favorable protection of foreign investors within the partner countries. BITs commonly include the FET provision that requires host states to provide fair and equitable treatment to foreign investors protecting them from arbitrary or discriminatory actions [28]. It is a provision that features in 90% of the international investment treaties dating back to 1940s when it started to appear in the international trade agreements [29]. It delegates substantial powers to investment tribunals in making of critical decisions and it's perceived by some commentators as a retraining factor to the host countries in terms of internal trade regulations.

4) Expropriation and Compensation:

A provision for compensation to a foreign investor in case of expropriation is a common feature of almost all international investment treaties [20]. BITs typically provide protection against expropriation without adequate compensation. The treaties or international trade agreements define the conditions under which expropriation may occur and the compensation due to the affected investor. The provision bans the host country from expropriating a foreign investor if the expropriation does not meet four requirements. The four requirements is noted to include the expropriation serves public purpose, it is done without any form of discrimination, it follows the established legal process, and it is accompanied by full compensation of the asset or assets involved [20]. It is on these grounds that arbitral tribunal is empowered to over settlement of disputes arising from such cases.

5) Free Transfer of Funds:

Capital Repatriation: BITs often guarantee the free transfer of funds related to an investment, allowing investors to repatriate profits, dividends, and other returns without undue restrictions.

6) Entry and Establishment:

Investment Protection: BITs may contain provisions related to the entry and establishment of foreign investments, outlining the conditions under which investors can establish and operate businesses in the host country.

7) Environmental and Social Standards:

Sustainable Investment: Some modern BITs include provisions related to environmental and social standards, encouraging responsible and sustainable investment practices.

8) Intellectual Property Protection:

Protection of IP Rights: BITs may include provisions to protect the intellectual property rights of foreign investors, ensuring fair and non-discriminatory treatment in this regard.

4.2. Regional Trade Agreements (RTAs)

While commenting on the proliferation of Regional Trade Agreements (RTAs), Chase and others observed that international trade is continuously being characterized by multiple RTAs with diverse provisions for the resolution of any possible disputes [10]. The authors noted that almost all of the existing RTAs have provisions establishing procedures and mechanisms for resolving trade disputes among the members. The argument for inclusion of Dispute Settlement Mechanisms in a RTA is that they provide a means of enforcing the trade commitments among member states who are involved in the agreement. Therefore, the DSM makes the agreement reasonably possible by taking care of any eventuality that would break it down due to non-commitment of a party [12]. The necessity for this inclusion is reinforced by the fact that several trade agreements have failed to take off or experience full implementation due to lack of compliance by the parties involved, especially those agreements between developing economies [24]. Therefore, mechanisms for ensuring compliance with the terms of international trade agreements are critical features.

While excluding the two multilateral trade institutions, General Agreement on Trade and Tariffs (GATT) and World Trade Organization (WTO), Smith listed over sixty RTAs across the globe which had been submitted and recognized by WTO between 1957 and 1995 [24]. Whereas majority of the 62 RTAs had provisions for involvement of a third party in the settlements of any associated disputes, 9 nine of them neither provided for a dispute review by a third party nor for a ruling over a dispute to be made by a third party. As such, arbitration was automatically eliminated as a possible mechanism for settlement of disputes that could arise from the nine (9) RTAs. Such agreements were absolutely liberal and based on the parties' goodwill, without any form of legalism. Closely related were five of the trade agreements which had provision for a review by a third party, but any ruling by the party was not binding to the involved parties. The ruling by the third party could be considered in the final resolution of the settlement. The rest of the RTAs, including COMESA and ECOWAS had provisions for involvement of a third party in reviewing and evening making binding rulings on the ensuing disputes.

1) Trade Liberalization:

Tariff Reductions or Elimination: RTAs often include provisions aimed at reducing or eliminating tariffs on goods traded between member countries, promoting free trade and market access.

2) Customs Union and Common Market:

Deeper Integration: Some RTAs go beyond tariff reductions and create customs unions or common markets, involving deeper integration by harmonizing customs procedures, coordinating economic policies, and allowing for the free movement of goods, services, and factors of production.

3) Rules of Origin:

Determining Origin Criteria: RTAs establish rules of origin to determine the eligibility of products for preferential treatment. These rules ensure that only products originating from within the member countries receive the benefits of the agreement.

4) Trade Facilitation:

Reducing Non-Tariff Barriers: RTAs often address non-tariff barriers to trade, such as regulatory standards and technical barriers, aiming to facilitate the flow of goods and services across borders.

5) Dispute Settlement Mechanisms:

Enforcement of Agreement: RTAs typically include mechanisms for resolving disputes between member countries, ensuring the enforcement of the agreement's provisions. This can involve consultations, mediation, and, in some cases, binding arbitration.

6) Services and Investment Liberalization:

Market Access for Services: Some RTAs extend beyond goods and include provisions for liberalizing trade in services and facilitating cross-border investment.

7) Government Procurement:

Open Procurement Markets: RTAs may contain provisions aimed at opening up government procurement markets among member countries, promoting transparency and fair competition.

8) Labor and Environmental Standards:

Safeguarding Labor and Environment: Modern RTAs may include chapters addressing labor and environmental standards, promoting sustainable development and ensuring that trade benefits are not achieved at the expense of workers or the environment.

4.3. International Trade Agreements and Legal Framework Governing Investment Dispute Resolution

International trade agreements can notably present significant effects on the legal framework governing investment dispute resolution [14]. The impact of these agreements varies depending on the specific terms and provisions included in each agreement, but some general effects can be identified: the three most significant effects include inclusion or exclusion of ISDS mechanisms, Standardization of the ISDS, ensuring transparency in the application of the ISDS, and facilitating enforcement of the ISDS.

1) Inclusion or Exclusion of Investor-State Dispute Settlement (ISDS) Mechanisms:

Many international trade agreements include provisions for Investor-State Dispute Settlement mechanisms, which allow investors to bring claims against host states for alleged treaty violations. The terms of ISDS mechanisms, such as the choice of arbitration or mediation, the selection of arbitrators, and the criteria for initiating a dispute, can be influenced by trade agreements.

Trade agreements may influence the harmonization of domestic laws related to investment and dispute resolution. States may need to align their domestic legal frameworks with the provisions of the trade agreement to ensure consistency and compliance.

2) Standardization

Some trade agreements work towards standardizing ISDS provisions across multiple agreements, promoting consistency in the resolution of investment disputes.

Trade agreements often seek to strike a balance between protecting the rights of investors and preserving the regulatory autonomy of states. Provisions may be included to ensure that states maintain the right to regulate in the public interest without facing excessive legal challenges from investors.

3) Transparency and Public Participation:

Most of the existing trade agreements have sought to include provisions that are aimed at enhancing the transparency of investment dispute resolution proceedings. This can involve making arbitration proceedings and awards more accessible to the public, thereby increasing accountability and legitimacy.

The effort of enhancing transparency has often been fostered through public participation. Some scholars indicate that trade agreements tend to encourage and require the involvement of the public or other stakeholders in the dispute resolution process to ensure a more inclusive and democratic decision-making process [17].

4) Facilitating enforcement of the ISDS

a) Precedent Setting: Decisions rendered in investment disputes under trade agreements can set precedents for the interpretation of treaty provisions. These precedents may influence how similar provisions are interpreted in future disputes, contributing to the development of international investment law.

b) *Inclusion of CSR Standards:* Some trade agreements incorporate provisions related to Corporate Social Responsibility and sustainable development. These provisions may impact the legal framework by emphasizing the importance of responsible business conduct and encouraging investments that contribute to sustainable development goals.

c) *Institutional Changes:* Trade agreements may lead to reforms in the institutional framework for dispute resolution. This could involve the establishment of specialized institutions or mechanisms for handling investment disputes, potentially enhancing the efficiency and effectiveness of the resolution process.

d) *Sanctions and Retaliation:* Trade agreements may include provisions for the enforcement of dispute resolution outcomes. This can involve mechanisms for imposing sanctions or retaliation if a party fails to comply with a ruling, providing an additional layer of deterrence.

4.4. Economic Consequences of Investment Dispute Resolution Under International Trade Agreements

Investment dispute resolution under international trade agreements, particularly through mechanisms like Investor-State Dispute Settlement (ISDS), can have various economic consequences [3, 27]. While these consequences can be complex and context-specific, here are some general economic impacts associated with investment dispute resolution:

4.4.1. Positive Economic Consequences

1) Investor Confidence:

It is observed that international investors are likely to grow in confidence when they are convinced of transparent enforcement of international trade agreements, exemplified by the investor-state disputes settlement [16]. Additional studies indicate that fair and effective investment dispute resolution mechanisms are capable of boosting investment confidence within the partner states. Knowing that there is a reliable process for resolving disputes can attract foreign investment and encourage investors to engage in cross-border business activities [4, 5, 13].

2) Risk Mitigation:

Provisions for effective mechanisms of solving investment disputes tend to reduce perceived risks among potential and existing investors [2]. Knowing that there is a mechanism in place to resolve disputes can reduce the perceived political and regulatory risks associated with foreign investments. This reduction in risk can make countries more attractive to investors.

3) Promotion of Foreign Direct Investment (FDI):

In the global perspective, the provisions of international investment agreements brings about regular inflows of foreign direct investments. A transparent and efficient dispute resolution process can potentially contribute to higher levels of Foreign Direct Investment by providing investors with a sense of security and legal recourse in case of disputes [15].

4) Stability in the Business Environment:

It is notable that reduced disputes in the presence of clear resolution mechanisms are ingredients for stable environment for conducting business [22]. Effective dispute resolution contributes to a stable business environment. This stability is conducive to economic growth, as businesses are more likely to invest and expand in environments with clear and enforceable rules.

Moreover, such provision play the role of reinforcing the rule of law in the international business arena. Investment dispute resolution mechanisms reinforce the rule of law by providing a structured and legal process for resolving conflicts [27]. This can contribute to the development of a legal and institutional framework that supports economic activities.

4.4.2. Negative Economic Consequences

It's important to note that the specific provisions and mechanisms can vary widely among different BITs and RTAs. The content of these agreements reflects the priorities and interests of the negotiating parties. Additionally, the landscape of international trade agreements is dynamic, with ongoing negotiations and revisions to existing agreements.

Additionally, the economic consequences of investment dispute resolution under international trade agreements are multifaceted. While effective dispute resolution mechanisms can contribute to economic growth and stability, challenges such as financial costs, deterrence effects, and constraints on policy flexibility need to be carefully managed to ensure a balanced and equitable international investment environment [3]. The specific impacts depend on the details of the dispute resolution mechanisms in place and the broader economic and legal context.

1) Financial Costs:

Legal expenses is one of the key shortcomings of international arbitration [13]. He notes that the process of resolving investment disputes through international arbitration can be expensive. Legal fees, arbitration costs, and potential compensation payments can impose financial burdens on both the investor and the host state [26].

2) Opportunity Costs:

Diverted Resources: Governments and investors may divert resources, both financial and human, towards resolving disputes rather than investing in productive activities. This diversion can have opportunity costs in terms of economic development and growth.

3) Deterrence of Investment:

Deterrence Effect: The existence of a dispute resolution mechanism can, paradoxically, deter some investors. The fear of potential disputes and legal proceedings might discourage certain investors from entering specific markets.

4) Policy Constraints:

Policy Limitations: Rigidity in investment protection provisions may limit a host state's ability to implement certain policies or regulations in the public interest. This can hinder the state's ability to adapt its regulatory framework to changing economic or social needs.

5) Chilling Effect on Regulation:

Regulatory Chilling Effect: The threat of legal action might deter governments from enacting or enforcing certain regulations, particularly in areas such as environmental protection or public health, for fear of facing costly disputes.

6) Inequality in Access to Justice:

Inequitable Access: Smaller or less economically developed countries may face challenges in accessing legal expertise or handling the costs associated with dispute resolution, potentially leading to unequal outcomes in favor of larger or more resourceful investors.

7) Potential for Inconsistency:

Inconsistent Decisions: The outcomes of investment dispute resolution can vary, leading to inconsistencies in legal interpretations and potentially creating uncertainty for future investors.

4.5. Arbitration as an International Investment Disputes Resolution Mechanism

Multiple scholars have cited arbitration as a widely used mechanism for resolving international investment disputes [14, 21, 27, 30]. They argue that the disputes resolution mechanism provides an alternative to traditional litigation in national courts and is particularly favored in the realm of international business and investment due to its perceived efficiency, flexibility, and neutrality [8, 27]. This point is further emphasized in a study noting the longstanding attractiveness of binding arbitration in solving commercial disputes among parties to whom the formal court processes were very inflexible, expensive, cumbersome, and slow [25]. Additionally, the courts are often unfamiliar with the commercial practices from which the disputes arise. This is contrasted with speedy administration of justice on commercial matters by merchant courts in the medieval times [25].

Among the initial embracers of arbitration as a suitable mechanism for solving commercial disputes in the American context is the country’s first president, George Washington. He indicated that any dispute that would arise from his will was to be settled or decided by three intelligent and impartial men and the decision of such men were to be treated within finality similar that of the United States’ Supreme Court [6]. The formal provision of arbitration in the United States was in 1768 by the New York Chamber of Commerce and later followed in 1817 when the New York Stock Exchange amended its constitution to include arbitration as one of its mechanisms for dispute resolution [9].

The existing investor-State arbitration framework is noted to have emerged in its modern form in the 1960s, with the conclusion of the International Centre for Settlement of Investment Disputes (ICSID) Convention and the first Bilateral Investment Treaties (BITs) [14]. The investment treaty network has grown since then to comprise more than 3000 International Investment Agreement (IIAs) binding a multitude of States worldwide. Switzerland is amongst the 154 Contracting States to the ICSID Convention and has concluded over 110 BITs with its trade partners. Along with Germany, Switzerland was one of the first countries to develop a BIT program and is today one of the economies with the widest IIA network worldwide.

Some of the key aspects of arbitration as an international investment disputes resolution mechanism have been pointed by scholars to include:

1) Voluntary Nature:

Arbitration is typically a consensual process, meaning that parties must agree to submit their dispute to arbitration. The agreement is often stipulated in contracts or investment treaties. It is significant that a founding principle of arbitration is that the parties are free to agree how to resolve the dispute subject only to public interest safeguards. Non-mandatory parts of the America’s Arbitration Act 1996 expressly provide the parties with an opportunity to make decisions on a range of matters. Additionally, the Supreme Court has specifically spoken of the need for respect for individual autonomy, which in a subsequent case has been taken to go so far as to mean that the fact that there is an agreement can alter what is a fair result and support a different award to the one that a court may otherwise have made. Taking an example from an arbitration case of Dolling-Baker v Merrett in England, arbitration proceedings are usually consensual and may thus be regarded as wholly voluntary, their very nature. There must be some implied obligation on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or the award, and indeed not to disclose in any other way what evidence had been given by any witness in the arbitration, save with the consent of the other party, or pursuant to an order or leave of the court [4].

2) Choice of Arbitrators:

While commenting on the relative advantage of using arbitration to handle international commercial disputes over the courts, Zekos opined that arbitration clauses grant liberty to the disputing parties to choose arbitrators who are experts in the relevant field [31]. This can contribute to a more informed and specialized resolution of the dispute. It is not uncommon to find that international commercial contracts are done by parties whose national court systems lack desirable forum for settling related disputes [18]. Therefore, parties getting into an international commercial contract have the option of including arbitration clause when negotiating and documenting their contracts. There is a longstanding frustration among practitioners as they try to use normal judicial systems in resolving international commercial disputes under predetermined laws and structures. Arbitration allows the disputing parties to agree on laws and rules to govern settlement of any possible disputes in amicable and efficient manner. The choice of arbitrators allows for selection of competent and experienced individuals with adequate knowledge on the specific commercial contract rather than a purely legal expert [19].

3) *Neutrality and Independence:*

Arbitrators are expected to be impartial and independent. This neutrality helps ensure a fair hearing for both parties and enhances the credibility of the arbitration process.

4) *Confidentiality:*

Arbitration proceedings are generally confidential. This confidentiality can be appealing to businesses and governments involved in sensitive matters, as it helps protect proprietary information.

5) *Flexibility and Informality:*

Arbitration procedures can be tailored to suit the specific needs of the parties involved. This flexibility allows for a more efficient and streamlined process compared to often rigid court procedures.

6) *Enforceability of Awards:*

Arbitral awards are typically enforceable in a large number of countries through international conventions such as the New York Convention. This enhances the effectiveness of the arbitration process by providing a means for enforcing the final decision.

7) *Expertise in Investment Law:*

Arbitrators in investment disputes often have expertise in international law, investment treaties, and the specific industry involved. This specialization can contribute to more informed and nuanced decision-making.

8) *Multinational Investment Treaties:*

Many bilateral and multilateral investment treaties include provisions for arbitration as the primary means of dispute resolution between investors and states. These treaties often specify the rules and procedures to be followed in the arbitration process.

9) *ICSID (International Centre for Settlement of Investment Disputes):*

ICSID, established by the World Bank, is a prominent institution that facilitates arbitration and conciliation of investment disputes. It provides a framework for resolving disputes between states and investors.

10) *Challenges and Criticisms:*

Despite its advantages, arbitration in international investment disputes has faced criticism. Concerns include potential lack of transparency, the risk of inconsistent decisions, and challenges to the legitimacy of private arbitrators deciding matters of public interest.

Arbitration has become a prominent and widely accepted mechanism for resolving international investment disputes. Its flexibility, neutrality, and enforceability contribute to its popularity in the global business and investment community. However, ongoing efforts to address criticisms and enhance transparency continue to shape the evolution of arbitration in this context.

5. Case Analysis

This section analyses a case in which a foreign investor (Eiser Infrastructure Ltd.) sued the Kingdom of Spain for violating the Energy Charter Treaty.

5.1. Facts

The Applicants sought the recognition and enforcement of ICSID awards rendered in their favor against Spain, while Spain invoked sovereign immunity from the jurisdiction of the court. Spain argued that the plea of immunity covers enforcement and execution, but not recognition. The Applicants argued that the plea of immunity can only be invoked with respect to execution, but neither with respect to recognition nor enforcement. Justice Stewart succinctly summarized the matter at hand as follows:

The applicants seek, under s 35 of the Arbitration Act, the recognition and enforcement of arbitration awards in their favor by converting them into judgments of the Court. They do not, at least not at this stage, seek to execute on the judgments. The distinction between recognition and enforcement, on the one hand, and execution on the other, is central to these reasons.

5.2. Issues

The Applicants put forth four major arguments: ICSID excludes "any claim for foreign state immunity in proceedings for the recognition and enforcement of an award, as opposed to in relation to any steps to execute upon a judgment that recognizes and enforces such an award"; "by becoming a Contracting Party to the ECT and a Contracting State to the [ICSID Convention], Spain submitted to the jurisdiction of this Court"; the sovereign immunities act "does not apply at the recognition and enforcement stage"; and the ICSID Convention has impliedly repealed the sovereign immunities act "to the extent of an inconsistency."

This case note deals only with the first and second argument, the so-called "foundational argument" and the "submission to jurisdiction." Spain's response is the following: the Applicants' "foundational argument must fail principally on the basis that the French and Spanish versions of the [ICSID Convention] draw no distinction between recognition/enforcement, on the one hand, and execution, on the other." The point Spain is making is that properly interpreted, the ICSID Convention "makes no such distinction with the result that Art. 55 expressly preserve the operation of domestic law on foreign state immunity in relation to the enforcement that the applicants seek." Ultimately, this argument rests on the lack of distinction between linguistic/semantic lack of distinction between enforcement and execution in the French and Spanish versions of the ICSID Convention. Justice Stewart summarized the crux of the matter as follows:

In the French and Spanish texts of Arts 53 to 55, there is no clear distinction in the language between what in English is reflected as "enforcement" and "execution". In the title to

Section 6 of Ch IV, the French text speaks of reconnaissance et de l'exécution and the Spanish text of reconocimiento y ejecución in place of the English "recognition and enforcement". Consistent with that, thereafter where the English text uses "enforce" or "enforcement" the French text uses l'exécution and the Spanish text uses ejecutar, ejecuten or ejecución. However, where the English text uses "execution" the French text still uses l'exécution (or d'exécution) and the Spanish text still uses ejecución (or ejecutará).

Thus, the ultimate question is whether there is a distinction between enforcement and execution for purposes of the plea of sovereign immunity. Put simply: is immunity preserved for enforcement and execution, or only for the latter? The ICSID Convention was drafted in three authentic languages: English, French, and Spanish. Three (or two) concepts are at play-recognition, enforcement, and/or execution-and there is some confusion or inconsistencies depending on languages.

5.3. Law

To answer the foundational argument and whether Spain has submitted to the court's jurisdiction, the court needs to interpret and apply international arbitration law-i.e. Articles 53, 54, and 55 of the ICSID Convention and Articles 34 and 35 of the Australian Arbitration Act (Arbitration Act)-and sovereign immunity law-i.e. sections 9, 10, and 30 of the Foreign States Immunities Act 1985 (FSIA). When doing so, the court needs to entertain treaty interpretation pursuant to the Vienna Convention on the Law of Treaties (VCLT)-i.e. articles 31, 32, and 33.

The general rule on immunity from jurisdiction identified in Article 9 of the FSIA is subject to several exceptions, for example, those found in Article 10. Pursuant to Article 10, a state is not immune if, for example, it has submitted to the jurisdiction by agreement. Agreement is defined in Article 3 of the same Act and includes a treaty or other international agreement. On the same lines, Article 30 deals with immunity from "enforcement by way of execution rather than enforcement by way of recognition and judgment."

5.4. Reasoning

Foreign arbitral awards are enforced in Australia "as if the award were a final judgment of a court." This is "done by making a judgment on the award." Justice Stewart noted that "depending on the context, reference to the enforcement of an arbitral award can be used to mean the entering of a judgment on the award to the exclusion of execution or it can mean execution, or it can encompass both." Furthermore, Justice Stewart noted that recognition and enforcement is "equivalent to what is referred to in civilian jurisdictions as exequatur." The English version of the ICSID Convention makes a distinction between enforcement and execution- articles 54 and 55 refers only to execution. Stewart J writes that:

In Art 54 that is clearly in the context of post-judgment execution measures. That much is clear from the reference being to "execution of judgments in force in the state". There can be no execution of judgments without a prior judgment. There is nothing to suggest that execution has a different meaning in Art 55 to what it has in Art 54 - use of the same word, in particular in such close proximity, and distinctly from the use of recognition and enforcement, would suggest that both uses are the same.

He continues in this light and explains that "the question of interaction with the [FSIA] only arises at the next stage of analysis," and that by becoming a signatory to the ICSID Convention, "Spain submitted to the jurisdiction of designated courts and therefore, in Australia, waived immunity under s. 10 of the [FSIA]."

Spain argued that if Articles 54 and 55 were to limit immunity from execution only, such would lead to an absurdity and "the court would be engaged in an exercise in futility by converting a Centre award into a judgment only to have that judgment rendered unenforceable on the grounds of immunity when execution is sought." Spain submitted that such creation would constitute a "zombie judgment" and that such "cannot have been the intention of the legislature."

Justice Stewart found Spain's submission to be wrong because "the question of interaction with the [FSIA] arises only at the next stage of analysis" due to "the distinction in the [FSIA] between immunity from jurisdiction and immunity from execution." If there is no immunity from jurisdiction, the question of a possible immunity from execution arises. Justice Stewart further explains, "that is the inevitable consequence of the separate treatment of immunity from jurisdiction and immunity from execution in Pts II and IV. This demonstrates that a so-called "zombie judgment" is not viewed by the legislature as an absurdity."

Justice Stewart explained that when "applicants are successful in having judgments entered against Spain," they can go about seeking to establish an exception to immunity from execution, for example by finding "commercial property" of Spain in Australia. It was reasoned that such property would be susceptible to execution, and therefore the award turned into a judgment would not constitute a "zombie judgment." Moreover, "the dichotomy between pre-execution (i.e. up to and including judgment) steps and execution (i.e. post-judgment) steps is quite clear in the Immunities Act itself."

Furthermore, Justice Stewart reasoned that so much is clear also from comparative law. Justice Stewart then exercised treaty interpretation vis-à-vis the ICSID Convention (i.e. entertained a comparative legal analysis). The justice analyzed the convention in light of its object and purpose, the preparatory work, the different language versions, scholarly work, and foreign cases.

With respect to the preparatory work, Justice Stewart analyzed the history of the ICSID Convention and concluded as follows:

There is nothing in the Report of the Executive Directors which would indicate that where foreign state immunity is preserved under Art 55 that includes foreign state immunity from the jurisdiction of any court. What is preserved is foreign state immunity from the execution of judgments, and that up to and including the recognition and enforcement of awards by making judgments on them no foreign state immunity is intended to be preserved. Indeed, Contracting States are obliged to equate an award rendered pursuant to the Investment Convention with a final judgment of its own court.

Justice Stewart then moved on to analyze the French and Spanish texts of articles 53, 54, and 55 of the ICSID Convention. The French and Spanish texts make no clear distinction between enforcement and execution, instead interchangeably using "l'exécution" or "d'exécution" (French) and "ejecución" or "ejecutará" (Spanish) for both enforcement and execution. Justice Stewart concluded:

Given that l'exécution in French and ejecución in Spanish are used in the text in some places to mean what in English would be understood as "enforcement" and in other places as "execution," the only way of reading the three texts consistently with each other is to give those words the meaning of the English word "execution" where they are used in Art 54 and Art 55.

Spain's submission to the contrary was not accepted because "properly interpreted, "execution," l'exécution and ejecución in Art 54 in all three texts can only mean what in English would be understood as post-judgment execution."

Having already analyzed the history, origins, purpose, and language differences, the justice embarked on comparing and contrasting (perhaps reinforcing) his conclusion against commentary to the ICSID Convention and foreign case law. Notably, the two leading authorities are Mr. Broches, also known as the "principal architect" of the ICSID Convention, and Professor Schreuer. According to Broches, states have two obligations for which the award is equated as a final court decision: "to recognise an award as binding and to enforce the pecuniary obligations imposed by it." Broches lands in a clear distinction between enforceability and its implementation by execution, which is governed by domestic law. Schreuer, on the other hand, does not agree with such an analysis. Instead, he lands in that "the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, would appear to be that the words 'enforcement' and 'execution' are identical in meaning." Justice Stewart concluded:

Understandably, the only sensible way of reconciling the three authentic texts is to interpret "enforcement" in Art 54 to include enforcement by recognition and by judgment, and to interpret "execution" as meaning post-judgment execution. "Execution" in Art 55 has the same meaning. I otherwise agree with what Professor Schreuer says about Art 55 - it clearly only deals with immunity from execution and not immunity from jurisdiction at the prior stage of enforcement.

Justice Stewart then highlighted the work of other prominent scholars that supports his position before embarking on an analysis of foreign case law. Primarily, he analyzed French and U.S. case law on the matter. Eloquently, the justice reasoned: "It is significant that the French courts, presumably with reference to the French text of the Convention, have recognised and maintained the distinction between recognition/ enforcement and execution in Arts 54 and 55. That rather tells against Spain's reliance on that text as revealing no such distinction."

Justice Stewart concluded that "it is thus apparent that the weight of comparative case law favours the interpretation that I have thus far come to." Having concluded so, the justice moved on to the conflict between Section 9 of the FSIA and the ICSID Convention, i.e., to figure out whether Spain had submitted to the jurisdiction of the court.

Section 10 of the FSIA makes it clear that "a state is not immune from jurisdiction in a proceeding in which it has submitted to the jurisdiction of the court," and such submission can be made "by agreement or otherwise." He did accept Spain's submission that the "arbitration-exception" in Section 17 of the FSIA deals exhaustively and exclusively with arbitration and that section 10 therefore cannot be relied on. He reasoned that "section 17 will continue to apply, and be required, in circumstances where the parties have submitted their dispute to arbitration without such submission amounting to a submission to the jurisdiction of the Court for the purposes of recognition and enforcement."

5.5. Holding

Justice Stewart concluded that the Applicants' foundational argument was established, and that Spain had submitted to the jurisdiction of the court by becoming a member to the ICSID Convention. Put differently, Spain had "waived any reliance on foreign state immunity from the jurisdiction of such courts in proceedings to recognize and enforce such awards."

The court ordered, among other things, that Eiser and Energia SARL have leave under section 35 of the Arbitration Act to enforce their ICSID award, and for Spain to pay EUR 128,000,000. The court also ordered that Infrastructure SARL and Energia BV have leave to enforce their ICSID award, and for Spain to pay EUR 101,000,000.

6. Conclusion

From the foregoing discussions, provisions of international trade agreements with specific reference to bilateral investment treaties and regional trade agreements have substantial impact on arbitration as an international investment disputes resolution mechanism. Specifically, the provisions of BITs and RTAs have popularized and recognized arbitration and arbitral tribunals in the resolution of international investment disputes. Provisions such as Investor-State Dispute Settlement (ISDS) and Fair and Equitable Treatment (FET) promotes the use of arbitral tribunals as opposed to the legal courts. While citing the North American Free Trade Agreement (NAFTA), Howse reports that arbitration has almost rivalled International Criminal Court in the handling of international investment disputes associated with the ISDS provision [13]. The author observed that the United Nations Commission on

International Trade Law (UNCITRAL) and the International Centre for the Settlement of Investment Disputes (ICSID) provide for an a foreign investor to indict a host country before an ad hoc arbitral tribunal in case the investment agreement or bilateral investment treaty is violated. This has seen an increase in the number of cases against several countries including the above analyzed case between Eiser Infrastructure Limited and the Kingdom of Spain.

Abbreviations

BITs	Bilateral Investment Treaties
EU	European Union
FET	Fair and Equitable Treatment
FSIA	Foreign States Immunities Act
ICSID	International Centre for the Settlement of Investment Disputes
ISDS	Investor-State Dispute Settlement
MFN	Most-Favored-Nation
NAFTA	North American Free Trade Agreement
RTAs	Regional Trade Agreements
TAs	Trade Agreements
TTIP	Transatlantic Trade and Investment Partnership
UNCITRAL	United Nations Commission on International Trade Law
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

Author Contributions

Amos William Omolo is the sole author. The author read and approved the final manuscript.

Conflicts of Interest

The author declares no conflicts of interest.

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