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Investor-State Arbitration in ICSID and Sri Lanka: A Crticial Appraisal

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Abstract

Sri Lanka's strategic location in the Indian Ocean has enticed foreign traders and investors to invest in the country since ancient times. The country's experience before investor-state arbitration has not been positive, as the government of Sri Lanka has twice been held liable for breaching bilateral investment treaty (hereinafter as BIT) obligations in *Asian Agricultural Products Ltd. V Sri Lanka* and *Deutsche Bank AG v Sri Lanka*. The *Mihaly International Corporation v Sri Lanka* was decided in favor of the state as the criteria of jurisdiction were unable to be satisfied. Hence, the purpose of this study is to analyze the reasons that placed Sri Lanka in a disadvantageous position before investor-state arbitration. This appraisal is much significant as two more cases are pending before the International Centre for Settlement of Investment Disputes (hereinafter as ICSID) against Sri Lanka, namely, *KLS Energy v Sri Lanka*, and *Eyre and Montrose Developments v. Sri Lanka*. The study evaluates the reception of international law by Sri Lanka's judiciary in light of the experience of Sri Lanka before ICSID together with relevant domestic decisions. The study concludes by identifying a way to balance investors' interests with the host state's interests for the necessary effectuation of the investment agreements within and outside the territory.

Keywords: *bilateral investment agreements, host state's interest, Investor-state arbitrationinvestor's interests, jurisdiction*

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The ICSID and Investor-State Arbitration

Most of the Investor-state arbitral cases are filed before the ICSID.[2] The Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965 (hereinafter, the ICSID Convention) is the constituent instrument of the ICSID. The purpose of the ICSID Convention is, *inter-alia,* to facilitate international cooperation for economic development by establishing facilities for international conciliation or arbitration to which contracting states and nationals of other contracting States may submit if they so desire[3]. The ICISD is an independent international organization having legal personality[4] but, structurally linked to the International Bank for Reconstruction and Development. (hereinafter as the World Bank).[5]

Initially, there were no cases registered with the ICISD, and between 1966 to 1996 only 35 cases were registered under the ICSID. However, with the proliferation of BITs in the 1990s, the number of investor-state claims increased, and as of now 640 arbitration cases and 10 conciliation cases have been registered under the ISCID[6]. According to Article 25(1) of the ICSID Convention, the ICSID has jurisdiction upon legal disputes arising out of an investment between the contracting states if the parties have consented to resolve their disputes in accordance with the ICSID Procedure. In addition to that, satisfying the criteria for jurisdiction is also subject to the definition of the investment in the disputed BIT[7]. Significantly, the Additional Facility Rules of 1978 allows nationals of non-state parties to bring investor-state claims against either a state party or a non-state party[8]. As Sri Lanka has ratified the ICSID Convention on October 12th, 1967, foreign investors can easily bring a claim against the Government of Sri Lanka (hereinafter as the GOSL) based on the provisions of BIT. Any dispute would be mainly governed in accordance with the rules of law decided by the parties, and in the absence of such rules, rules of contracting parties and rules of international

[2] *Investor–State Dispute Settlement and Impact on Investment Rulemaking, UNCTAD, 2007*
[3] The Preamble to Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965, 17 UST 1270, TIAS 6090, 575 UNTS 159
[4] ICSID Convention, Article 18
[5] ICSID Convention, Article 2,4,5
[6] The ICSID Case Load-Statistics(Issue-2018-1) International Centre for Settlement of Investment Disputes,2018
[7] Rudolf Dolzer & Christopher Schreure, *Principles of International Investment Law*,(Oxford University Press, 2012) at 6-78
[8] Additional Facility Rules, Article 2

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law would be applicable[9].

Sri Lanka and ICSID

Except for the BIT between Sri Lanka and China, all of Sri Lanka's BITs recognize the ICSID as the forum for investor-state arbitration[10]. According to Sri Lanka China BIT, unsettled disputes are submitted to an international arbitral tribunal established by both parties[11]. Investors can bring disputes against the GOSL before international arbitral tribunals without exhausting the local remedies.

The country's experience before the ICSID has not been pleasant, as the GOSL has twice been found guilty of violating international law obligations on foreign investment. Due to the investors' failure to satisfy the jurisdictional requirements, those two claims were unsuccessful. The two cases decided against the government are *Asian Agricultural Products Ltd. V Sri Lanka[12] (*hereinafter*, AAPL V Sri Lanka)* and Deutsche *Bank AG v Sri Lanka*[13]. (hereinafter, Deutsche Bank v SL) The *AAPL* case is significant as it marks the first-ever case filed by a foreign investor against a State under the auspices of the ICSID. *Mihaly International Corporation v Sri Lanka*[14] is the case decided in favor of the state before the ICSID. The *Mihaly case* was dismissed by the tribunal as the relationship that the parties had (as the exchange of letters) and pre-investment expenditures made by the claimant were not considered within the meaning of 'investment' under the SL-USA BIT. The case was thus dismissed because the panel lacked the jurisdiction to hear it.

AAPL V Sri Lanka

The AAPL was a Hong Kong Corporation that established a joint venture named Serendib Sea Food Ltd to cultivate and export shrimp to Japan from Sri Lanka. The dispute arose during the civil war in 1987, in which the

[9] ICSID Convention, Article 42(1)

[10] SL-Australia BIT, Article 13(2)b; SL-BLEU BIT, Article 10(1);SL-Czech Republic BIT,Article 8(2); SL-Denmark BIT,Article 8(2);SL-Egypt BIT,Article 8 (2);SL-Finland BIT,Article 9(1); SL-Germany BIT,Article 11(1); SL-India BIT,Article 10(3)a;SL-Indonesia BIT, Article VIII(3); SL-Japan BIT, Article 11;SL-Netherland BIT,Article 8(1); SL-Norway BIT, Article 9(1); SL-Pakistan BIT, Article 10(1); SL-Swiss BIT,Article 9(1)

[11] SL.China BIT, Article 13 (3)

[12] (1990)*ICSID Case NO,ARB/00/2*

[13] (2012) *ICSID Case No*ARB/09/02

[14] (2002)I*CSID* Case No ARB/00/2 (Ths case will not be discussed in detail as it was dismissed by the tribunal)

investor's shrimp farm was destroyed and killed more than 20 employees in the course of counter-insurgency operation by the security forces[15].

The AAPL claimed that Article 2.2 of the UK-Sri Lanka BIT(extended to Hong Kong), which dealt with 'full protection and security' prescribed a strict liability standard and did not require establishing that the state had acted with fault[16]. The tribunal, however, rejected this argument, holding that the words "shall enjoy full protection and security" of Article 2 must be interpreted in accordance with the common use that custom has affixed to them.

The claimant also relied on the MFN provision of the treaty (Article 2(2) and stated that the Swiss- Sri Lanka BIT does not provide for a 'war clause' or 'civil disturbance' as an exemption to the MFN, thus, it is more preferential to the investors. Hence, they viewed that the MFN clause in Swiss-Sri Lankan is more preferential than in the SL-UK BIT. However, this claim was not successful. The tribunal held that in the absence of 'a war clause' or civil disturbances', the SL-Swiss BIT does not provide a strict liability standard for the losses suffered due to property destruction. Accordingly, the court decided that the claimant was unable to prove that the Swiss-Sri Lankan BIT contained more preferential treatment than the SL-UK BIT[17].

Nevertheless, the tribunal found that the State was liable for the damage resulting from the investment as a consequence of "war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot" under Article 4(1). Based on the generally accepted rules of international law, it was held that the state was unable to provide due diligence obligation under the minimum standard of customary international law[18]. The reason was that the government was unable to undertake precautionary measures to resolve the situation peacefully before launching the armed attack[19]. The court went on to state that BITs are not closed legal systems but, have to be seen in a wider juridical context, including customary international law and domestic law. The majority decided that the amount of compensation

[15] (n. 11). Para 79
[16] *Ibid*(para.45-53)
[17] *Ibid*,(Para 54-55)
[18] *Ibid*,(Para 67)
[19] *Ibid,*(Para 72-86)

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should sufficiently reflect the full amount of the investment lost consequent to the said destruction and awarded US $ 460,000/- as compensation.

However, Justice Samuel K.B. Asante in his dissenting opinion contended with the majority opinion and emphasized that the Sri Lankan government had undergone a formidable security situation and grave national emergency in which the Tamil Tigers had established their control of the area surrounding the farm in Batticaloa District since early 1986. When there was no strong evidence as to whether Sri Lankan security forces destroyed the farm, he viewed that it could not be argued as to excessive force had been used to destroy the Tamil Tigers. He further stated that the general rule of customary international law was that the host state was not liable for losses or damage sustained by a foreigner due to war, armed conflict, insurrection, revolt, riot, a national emergency, or other civil disturbances. Hence, Justice Samuel contended that the GOSL was not liable for the damages.

Deutsche Bank v Sri Lanka

Deutsche Bank v Sri Lanka is the second arbitral case decided against GOSL on the provisions of expropriation and fair and equitable treatment. The Ceylon Petroleum Corporation (hereinafter CPC) entered into oil hedging agreements with several foreign and local banks in 2007 and 2008., In this case the disputed agreement was the agreement entered into with Deutsche Bank in July 2008. The Sri Lankan government used hedging as a means of avoiding the negative impact of rising oil prices. According to the Agreement, both parties agreed to US$ 112.50 as the strike price of one barrel of Dubai crude oil. If the oil price was higher than the strike price, the Deutsche Bank had to pay the CPC and the CPC would have had to pay the Deutsche Bank if it had been less. When the price of oil rose in July 2008, the Deutsche Bank made the payment of US $ 35 523.81. Subsequently, the oil price began to fall, and the CPC paid more than US $ 6 million by November. The Sri Lankan government had discussions with Deutsche Bank to restructure the agreement as there was a fall in oil prices in the world market.

Meanwhile, several fundamental rights petitions were filed in the Supreme Court (hereinafter the SC) of Sri Lanka alleging that their right to equality has been violated, which is guaranteed under Article 12(1) of the Constitution

by not letting the public to enjoy the benefit of the low oil price in the world market[20]. Concerning the investor-state disputes which have been filed before the ICSID against Sri Lanka, domestic cases were involved only relating to the Deutsche Bank Case. The SC issued an interim order halting the payment to the bank and the Central Bank of Sri Lanka initiated an investigation[21]. The Court did not refer to the international obligation arising from the investment agreement. The capacity of the Chairman of the CPC was questioned and identified as an act of ultra-virus. Then, the Bank initiated an investor-state claim against Sri Lanka based on the SL-Germany BIT, alleging that the interim order of the SC had amounted to expropriation under the BIT. Following that, the Supreme Court issued a final order terminating all fundamental rights cases and vacated all interim orders, determining that the Executive had not acted in accordance with the Court's ruling. Because the CPC was unable to provide the oil to the public at the low price.

The arbitral ruling is significant because it addressed issues including the CPC's power to engage into contracts, the state's responsibility for the CPC's conduct, and the definition of "investment." The tribunal has given a broad asset-based definition to the notion of investment in this case when determining whether a hedging arrangement constitutes an investment. The panel viewed that heading as a claim to money that had been utilized to generate economic benefit for Sri Lanka and as legal property with an economic value for Deutsche Bank.

Referring to Article 4(2) of the SL-Germany BIT on expropriation, the court relied on the sloe effect test, accepting that the effect of a particular severity must not necessarily require economic loss, even substantial interference with rights can also be quantified as compensation. The police power argument made by Sri Lanka was rejected adopting the proportionality test and decided that Sri Lanka does not have extensive discretion to interfere with investments in the exercise of "legitimate regulatory authority"[22].

[20] S.C.(FR) 535/2008 and S.C.(FR) 536/2008. Case No. 535/2008 was brought against Hon. A.H.M. Fowzie, Minister of Petroleum and Petroleum Resources Development; Ceylon Petroleum Corporation; Ashantha de Mel, Chairman of CPC; Sumith Abeysinghe, Secretary to the Treasury; Hon. G.L. Pieris, Minister of Export Development, and International Trade; Hon. Minister of Finance; The Monetary Board of Sri Lanka; and The Attorney General. , Case No. 536/2008 was brought against the Hon. A.H.M. Fowzie, Minister of Petroleum and Petroleum Resources and Development, Ashantha de Mel, Chairman of CPC, and others.

[21] See Case No (FR) 535/2008 and SC(FR) 536/2008

[22] (n.12) para 522

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In conclusion, the tribunal awarded more than the US $ 68 million as compensation against Sri Lanka.

Pending cases before the ICSID against Sri Lanka

Currently, two cases are pending at the ICSID against Sri Lanka. KLS Energy, a Malaysian investor, filed a case in 2018 at the ICSID for a cancellation of a wind and solar hybrid power plant project in Jaffna by the government in which the claimant had invested[23]. The case has been made under the Malaysia- Sri Lanka BIT, claiming US $ 150 million. According to the available sources, the Ceylon Electricity Board (hereinafter as CEB) had approved the project and signed a 20-year power purchase agreement with the investor[24]. But, the CEB claims that KLS Energy has not honored its investment claim and thus, canceled it in 2016. The investor alleges that the CEB was delaying the project despite having invested US $ 22 million.

In 2016, Eyre and Montrose Development (Pvt) Ltd sought remedy from the ICSID under the UK- Sri Lanka BIT for re-acquisition of land close to the Parliament complex in Kotte(near Colombo), where it was earlier decided to construct a hotel[25]. However, this matter is still pending before the ICSID.

The Reception of International Law trough Sri Lankan Judiciary

Before analyzing how the domestic courts have dealt with matters relating to foreign investment, it is pertinent to deal with the judicial approach towards international law obligations in general.

Sri Lanka's position regarding the applicability of international law to domestic law through the judiciary has been slowly moved from rigid interpretation to liberal interpretation. Concerning customary international law, the country follows the monist approach, and consequently no enabling legislation is needed[26]. However, concerning international treaties, the country has followed the dualist approach since independence to incorporate international treaties into the domestic sphere[27]. In *Leelawathie*

[23] *KLS Energy Lanka FdnBhd v Sri Lanka*, ICSID Case No ARB/18/39
[24]<http://www.dailymirror.lk/105243/KLS-Energy-and-CEB-blame-each-other-over-halted-solar-hybrid-plant-in-Jaffna>last visited on 01April 2022
[25] *Raymond Charles Eyre and Montrose Developments (Private) Limited v Sri Lanka,* ICSID Case No ARB/16/25
[26] See *Attorney General v. Sepala Ekanayake*(Supreme Court, 1982)
[27] Ceylon Order-in-Council (1946) Articles 45 and 4 (2)

v. Minister of Defense and External Affairs[28] it was decided that, though the Universal Declaration of Human Rights contains the highest moral authority, it has no binding force as it is not a legal instrument and forms no part of the law of this country[29]. This position was taken to its culmination in the case of *Singarasa v Attorney- General*[30]. Though the dualist countries had moved towards monism in the matters involving human rights, in Singarasa case, the Chief Justice viewed that,

> "The resulting position is that the petitioner cannot seek to vindicate and enforce his rights through the H.R.C. at Geneva, which is not reposed with judicial power under our Constitution. The Supreme Court being the highest and final Superior Court of record in terms of Article 18 of the Constitution cannot set aside or vary its order on the basis of the findings of the H.R.C. in Geneva; which is not reposed with any judicial power under or in terms of the Constitution" [31]

Accordingly, he opined that, a treaty or a covenant has to be implemented by the exercise of legislative power by the parliament as the dualist theory underpins our (Sri Lanka's) Constitution.

However, this stance was relaxed gradually, and in *Tikiri Banda, Bulankulame v The Secretary, Ministry of Industrial Development* (famously known as the *Eppawala Case*),[32] the Supreme Court referred to the concept of sustainable development and inter-generational equity drawn from the Stockholm Declaration and Rio Declaration. Justice Amarasinghe stated that,

> "Admittedly, the principles set out in the Stockholm and Rio De Janeiro Declarations are not legally binding in the way in which an Act of our Parliament would be. It may be regarded merely as 'soft law' Nevertheless, as a Member of the United Nations, they could hardly be ignored by Sri Lanka. Moreover, they would, in my view, be binding if they have been either expressly enacted or become a part of the domestic law by adoption by the superior courts of

[28] 68 N.L.R. at 488-9 (1965)
[29] *Ibid.,* p. 490
[30] SC. Spl(LA) 182/99
[31] *Ibid*
[32] 3 Sri LR 243 (2000)

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record and by the Supreme Court, in particular, in their decisions."[33]

In *Manohari Pelaketiya v H.M. Gunasekara and others*[34] where sexual harassment experienced by a female teacher was challenged, the Supreme Court linked the international treaty obligations emanating from the Convention on the Elimination of All Forms of Discrimination against Women in interpreting the fundamental rights guaranteed under the Constitution. Similarly, in *Ravindra Gunawardena Kariyawasam v Central Environmental Authority* (hereinafter as the CEA),[35] a recently decided case, (famously known as, Chunnakam case) the court was guided by the principles of the Rio Declaration, especially the Polluter Pays principle, ordering the thermal power station in Chunnakam to pay compensation to the people.

The Response of the Domestic Judiciary relating to Foreign Investment-related Matters

Recent judicial decisions involving cases involving foreign investments have taken a pro-state approach rather than a pro-investor approach. For instance, cases like *Eppawala* and *Chunnakam* have subtly informed the people that foreign investors degrade the ecological balance of the state or exploit its natural resources. Therefore, stringent investment project clearance procedures are needed to regulate the investors.

In the *Eppawala* case, a dispute arose between foreign investors and GOSL relating to the phosphate deposit in Eppawala, Sri Lanka. The proposed foreign investment agreement was questioned by potential adversities, the residents of Eppawala, which included cultivators, landowners, and also the chief incumbent of a temple. The Supreme Court was of the view that sustainable development has to be the policy of the government in economic development. As the investment activities had not been initiated, the rights of the investors were not discussed in this case.

In the *Chunnakam* Case, the petitioner filed a fundamental rights petition before the Supreme Court alleging that the Northern Power Company (the power plant) had contaminated the groundwater in the Chunnakam area in the Jaffna peninsula, making it 'unfit for human use. The thermal power

[33] *ibid*
[34] SC/FR/No. 76/2012
[35] SC/FR/141/2015

plant was a foreign investment. As it was proved that the power plant had been operated negligently without exercising due diligence, the court held that the statutory authorities like the Central Environment Authority and Board of Investment had failed in monitoring the power plant. The Court has further noted that the BOI and the CEA have violated the right to equality of the residents of Chunnakam. The Court referred to the 'precautionary principle', 'the polluter pay principle', the public trust doctrine, and 'sustainable development' in justifying its decision. However, it cannot be assumed that this determination would lead to an investor-state dispute as the power plant was permitted to continue under the intense monitoring mechanism of the BOI and the CEA.

Relating to the Deutsche Bank matter, it was contended in *Wegapitiya v A.H.M. Fowzie*[36] that, CPC did not have the authority to enter into a Hedging Agreement with the Deutsche Bank and the Chairman of CPC had no authority to execute such agreements without any authority of the board of directors. In November 2008, *inter alia,* the Court issued an interim order suspending all payments by the CPC to Deutsche Bank and also suspending the chairman of the CPC for alleged misconduct. Further, it ordered the Monetary Board to continue its investigations and fix the oil price. In January 2009, the Court issued the final order terminating all fundamental rights applications and vacated all its interim orders, deciding that the Executive had not acted in accordance with the ruling of the Court. Chief Justice S.N. Silva noted that it was unproductive to rule on the matter when the executive had failed to obey the court orders. This was a slap for the CPC and the government as reverting the ruling of the SC made them pay back millions of dollars to foreign banks.

The interim orders were analyzed at the ICSID and it was found that they had violated the fair and equitable treatment and expropriation clause of the BIT. In the first interim order, the Court viewed as follows,

> "[t]he petitioners have established a strong prima facie case that these transactions have not been entered into lawfully: that they are not "arms-length transactions"; that they are heavily weighted in favor of the Banks; that they are to the detriment of [CPC] and

[36] S.C. (FR) No. 535/2008.

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> through that to the people of Sri Lanka; that they amount to an abuse of statutory authority which denies the people the equal protection of the law"[37]

Nonetheless, the Court did not assess the rights or the legitimate expectations of the investors. As hedging agreement is an international obligation, both parties must respect its obligation and national law cannot be used as an exemption to defeat its national obligations[38]. However, the Supreme Court failed to underline this, which ultimately resulted in another investor-state arbitration case against Sri Lanka.

Further, concerning the administration of justice in Sri Lanka, the delay in executing the law has tended the people to lose faith and confidence in the judicial system of the country. According to the ministry, there were 5,890 cases in the Civil Appellate High Courts, 4,817 cases in the Court of Appeal, and 3,486 cases in the Supreme Court [39]. Regardless of whether the parties are natives or foreigners, it typically takes 20 to 30 years to resolve a land dispute[40]. If the case is relating to a land, the litigants or parties to the dispute may no longer be living when the dispute is resolved. This situation is the same as in criminal cases. Due to a lack of sufficient staff and infrastructure, the district courts, magistrate courts, and court of appeal have to handle a large volume of cases. Further, the allocated time to settle investment-related dispute through local judicial remedies is mentioned as a maximum of 12 months in Sri Lanka's BITs which is not realistic. The delay in the administration of justice has inclined foreign investors inter alia, not to resort to local remedies.

Hence, it can be argued that though Sri Lanka is bound by the decisions of investor-state arbitration, when incorporating international law into a domestic context, the country still follows the dualist approach. Investment agreements were not referred to in the investment-related judgments by the judiciary of Sri Lanka.

[37] ibid
[38] Vienna Convention on the Law of Treaties. 1969, 1155 UNTS 331, Article 27
[39] <http://www.ft.lk/ft-view/Justice-delayed/58-652015>last visited on 01 April 2022
[40] <http://www.dailymirror.lk/article/Truth-behind-Law-s-Delay-117949.html > last visited on 01 April 2022

Balancing the Public Interest in Investment Treaty Arbitration

Investor-state dispute settlement (hereinafter as ISDS) is the most effective international remedy available to the investor, and it also helps the host state to attract more foreign investors[41]. ISDS operates with the consent of the host state and home state, not with the consent of the private investor. The investment tribunals rule on governmental actions and measures that have adversely impacted on investment[42].

When regulatory measures taken by the government are struck down by the arbitrators who are foreign nationals, criticisms have been made even against ISDS for its democratic deficit, confidentiality and secrecy, lack of independence, and lack of judicial review power[43]. If a system curtails democratic principles such as accountability, and transparency, while letting people be inaccessible and structurally isolated from public input, that system creates a democratic deficit[44]. It is argued that reviewing such actions by a tribunal would interfere with state power and the public interest because state rules are representations of public will that are approved by publicly elected representatives[45].

On many occasions, tribunals have been reluctant to examine the motivation behind the host state's state measures[46]. Moreover, as in commercial arbitration, neither pleadings nor the hearings make available to the public, and final decisions that are largely based on commercial principles are released to the public when only the consent of the parties is given[47]. Specifically relating to the two cases pending before the ICSID against Sri Lanka, the author was unable to find reliable facts as the documents are not

[41] Rudolf Dolzer and Christopher Schreure, *Principles of International Investment Law*, Third Edition(Oxford University Press, 2012) at 236
[42] ibid
[43] Bernali Chaudry, "Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit", *Vanderbilt Journal of Transnational Law*, Vol.41, no. 775 (2008) at 785-789, Also see Kingsbury,B., & Schill, S., (2010) 'Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest - The Concept of Proportionality', in S Schill (ed), *International Investment Law and Comparative Public Law*, at114
[44] Ibid,at.785
[45] Ibid, at 778
[46] *Cia del Desarollo de Santa Elena SA v. Costa Rica*, 1 ICSID (World Bank) 96 (17 February 2000), *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States* ICSID Case No. ARB (AF)/00/2, *Metalclad Corporation v. The United Mexican States,* ICSID Case No. ARB(AF)/97/1, Award (30 August 2000)
[47] Benali (n.42) at 786

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accessible on the UNCTAD website[48]. In general, arbitrators parallelly work as counsel of another case, they are concerned about their reappointment as arbitrators and not about the effects of the judgment on the public at large[49]. Therefore, the independence of tribunals has been subjected to much criticism[50]. The exit of Bolivia and Ecuador from ICSID is justified by them based on these factors[51]. Even the UNCTAD 2015 report suggests abandoning the ISDS system as an option for reformation to have a balanced approach.

In order to avoid the aforementioned drawbacks of the ISDS, the ICSID has made several changes to their system[52]. The ICSID now publicizes cases on its website which have been registered under it with a short description[53]. Although publication of pleadings and awards are still subject to the consent of parties, the ICSID has amended its rules to allow for the prompt publication of excerpts of the tribunal's legal reasoning[54]. Further, it permits persons other than thearties to attend the hearing of the tribunal with the consent of the parties[55].

A Way Forward to Sri Lanka

One important feature of the ICSID Convention is that its decisions are not subject to appeal. Article 53 of the Convention states that the award shall be binding on the parties and shall not be subject to any appeal or any other remedy except those provided for in this Convention. This mandatory nature of the decisions demands that host states should take precautionary steps to mitigate the risk of litigation. As the BIT is considered as a self-contained regime[56] the BIT should itself be able to properly balance the interests of the investors and the regulatory power of the host state[57]. As the matters relating to arbitration are largely based on commercial principles and

[48]<https://investmentpolicy.unctad.org/investment-dispute-settlement/country/198/sri-lanka/respondent>last visited on 01May 2021

[49] Benali (n.42) at 786-787

[50] *Ibid*.

[51] World Investment Report 2015

[52] Mary Footer, "BITS and Pieces: Social and Environmental Protection in the Regulation of Foreign Investment", *Michigan State Journal of International Law,* vol.18,no.1(2005), at 36

[53] OECD Working paper on international investment, Working Paper no 2004/4

[54] ICSID Rules, Article 37

[55] The ICSID Rules, Rules 32 and 37

[56] (n.11) at para 21

[57] Kingsbury &Schill, (n. 42) at 75

decided by private arbitrators who worked as legal counsels, the BIT should be able to reserve some policy space for the host state to legitimize their regulatory power[58]. Otherwise, the investor-state mechanism would have more potential to be biased towards investors.

Mitigating this potential risk, modern BITs provide space within the BIT for the host state to legitimize its regulatory power so that arbitrators would be able to interpret the explicit provisions of the BIT. These BITs are designed to strike a reasonable balance between the foreign investor and the host country[59]. Although many traditional BITs are not well equipped to provide guidance for tribunals, modern BITs have attempted to reflect public concerns of the host state in preamble, expropriation provisions, or in general exception clause or in the separate provision on environment, health, labor rights or in any other provisions as performance requirement clause. This trend can be widened through the modification of existing BITs or drafting modern BITs when states initiate bilateral investment relations.

In *AAPL V Sri Lanka* case, the disputed UK-Sri Lanka BIT does not contain even an essential security exception that provides space for the host state to legitimize its measures that purposed to ensure essential security interests. If the State had foreseen the consequences of contractual obligations of the treaty at the time of drafting or if the treaty provided poper latitude for the public interest of the host state in the expropriation clause or security exemption clause, the decision would have been changed.

Similarly, the German-Sri Lanka BIT also represents the elements of traditional BITs and not provided proper latitude for the host state to legitimize its lawful actions taken for the public interest. Not only the situation is same as Malaysia- Sri Lanka BIT and the UK-Sri Lanka BIT, but with all other Sri Lanka's BITs. None of the BITs contains a general exception clause to provide policy space for the host state to legitimize such regulation. If so, it can exempt the violations of other treaty commitments if it purposed the public interest.

Further, when the Deutsche Bank matter was decided by the Supreme Court, delivering the interim order, international obligations that have been arisen based on the BIT or the Hedging Agreement were not seriously taken into

[58] Bernali (n.42) at785-789
[59] World Investment Report (n.15) at 121-163

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consideration and it allowed the CPC to suspend the Contract entered with the Bank.

Therefore, it is suggested that Sri Lanka should revisit all BIT commitments providing proper latitude for the host state to legitimize her state measures taken for the public interest. Both *KLS energy* and *Eyre Montrose Development* cases would also be decided against the country if the jurisdiction is satisfied as the disputed BITs are also more prone to protect the interests of the investors.

Conclusion

As it is explored, the experience of Sri Lanka before the ICSID has not always been advantageous to Sri Lanka. Arbitration becomes more challenging for States like Sri Lanka if the BITs do not adequately represent both the interests of investors and the host state. Although the application of international obligations in domestic cases is progressive in the area of human rights and environmental rights, investment treaty obligations are not yet emobdied through juridical decisions. In contrast, the contested BITs in the *AAPL* and *Deutsche Bank* cases failed to adequately protect the host state's interests, and consequently, the government was defenseless before the ICSID. Many countries, including India, Colombia, Chile, Peru, Japan, Korea, Singapore and Taiwan have refined and revisited their BITs to provide proper latitude for the host state to exercise regulatory power. The current BITs must therefore be reviewed promptly in order to take advantage of the island's geographic location and also to prevent another investor-state claim against the GOSL.