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Solidarity in the ICSID Convention: An Exploration

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Abstract

The International Centre for Settlement of Investment Dispute (ICSID) is one of the key international organisations in the area of International Investment Law. The awards rendered by the ICSID are defining the jurisprudential development of the contemporary International Investment Law. The paper titled “Solidarity in the ICSID Convention: An Exploration” examines the ICSID Convention from the perspective of solidarity. As a prelude to this, the paper explores the concept of solidarity in general in international law. For the purposes of this paper a functional approach to solidarity is undertaken. Based on this functional approach solidarity is considered to encompass three constituent elements of mutual wellbeing, fairness and interdependence within the ICSID framework. The paper maps in detail the provisions under the ICSID Convention which incorporate these three elements of solidarity. It is found that ICSID Convention is thoroughly laced with the elements of solidarity in a manner that they are an integral component of the Convention. The present paper further traces the trends in the working of the ICSID Convention which may erode solidarity. It identifies at least three trends which may erode the institutional value of solidarity. The methodology for the proposed study is exploratory analysis of the provisions of the ICSID Convention and the arbitral decisions and awards by some of the tribunals constituted thereunder.

Keywords

ICSID Convention, solidarity, mutual wellbeing, fairness, interdependence

Author information and acknowledgements

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I. Introduction

Solidarity in groups of human beings is a ubiquitous phenomenon. It is found in almost every human society, human associations and groups of all kinds and all sizes. How does solidarity influence the politico-legal and judicial processes in a society and how do the politico-legal and juridical processes influence solidarity in a society, is a subject of keen scholarly interests in the fields of anthropology, sociology and law. The contemporary era of globalization has expanded the scope of study horizontally to understand the interplay of solidarity with various globalizing processes and institutions at the international level. The present paper seeks to explore the elements of solidarity in the working of the International Centre for Settlement of Investment Dispute (hereinafter referred as the ICSID or the Centre). The ICSID was established in 1965 under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (herein after called the ICSID Convention or the Convention). It provides facilities in the nature of international arbitration and conciliation for the settlement of investment dispute between a Contracting State and national of Other Contracting State. It governs the constitution of the Centre and states the fundamental principles and rules for the administration of the international facilities for arbitration and conciliation for the settlement of the investment disputes.

The paper argues that the ICSID Convention is an expression of solidarity at the international level. The solidarity in the context of ICSID Convention can be evaluated using a functional approach consisting of three core elements. These are mutual well-being, fairness and interdependence. Paper is divided in six parts. The first part is introduction. The second part following the introduction gives the lingual meaning of solidarity and highlights its politico-legal contexts. The third part examines the interplay of solidarity in international law. It explains functional approach to solidarity at international level and its manifestations. The fourth part evaluates the ICSID Convention using the three-component based functional approach to solidarity. The fifth part evaluates the strength of solidarity in the ICSID Convention in the

contexts of legitimacy crises and other concerns raised by various critics. The last part of the paper contains the key concluding points of the paper.

II. Meaning and Politico-Legal Contexts of Solidarity

The Merriam-Webster defines solidarity as "unity (as of a group or class) that produces or is based on community of interests, objectives, and standards".[1] Cambridge Advanced Learner's Dictionary & Thesaurus defines solidarity as "agreement between and support for the members of a group, especially a political group".[2] Collins English Dictionary defines solidarity as "unity of interests, sympathies, etc. as among members of the same class".[3] On an analysis of these definitions from the leading English dictionaries the following is evident:

a. Solidarity is feature of a group.
b. It is a composite term to describe the state of interdependent association, community of interests, commonality of approaches among the members of group-in-solidarity.
c. It further connotes spirit of collectivism and mutual obligations among the members of group for promotion and preservation of mutual and common interests of the members of the group.

The interdependent association, community of interests, commonality of approaches and purposefulness are the bases for solidarity in a group; the benefit of solidarity is the spirit of collectivism and mutual obligations in the promotion and preservation of mutual and common interests of the members of the group. Solidarity of a group may be reflected in socio-cultural and political associations, but the essence of solidarity is more than mere unified association. The philosophical connotations of solidarity in political contexts are far more complex than the unified association of one or more group having common or mutual interests.

Duguit was a leading French philosopher to study solidarity in the context of political and legal institutions of the society. He asserted that interdependence of men was "an outstanding fact of human society" and social interdependence among them was "an unescapable truth of human existence".[4] Based on this assertion he argued that all human organizations should work for smoother and fuller co-operation between people.[5] He asserted that the state and laws in a society should be judged according to their contribution in strengthening social solidarity and so argued that their existence was justified so long they contributed to promotion, protection and preservation of social solidarity. If the state ceases to promote and hold social solidarity, Duguit asserted that it is duty to revolt against it.[6] Thus he sought to demystify state, sovereignty and law as institutions which were either mystical or indispensable or unaccountable.

Duguit denied existence of rights for men as he asserted that man has always lived in society where the inescapable truth was interdependence of men. He said that it was mythical to assert that men ever lived entirely independently by the rights of his own. "The only right which any

[1] Merriam-Webster.com Dictionary, available at https://www.merriam-webster.com/dictionary/solidarity, accessed on January 11, 2021.

[2] Cambridge Advanced Learner's Dictionary & Thesaurus, available at https://dictionary.cambridge.org/dictionary/english/solidarity, accessed on January 11, 2021.

[3] Collins English Dictionary, available at https://www.collinsdictionary.com/dictionary/english/solidarities, accessed on January 11, 2021.

[4] Dias, R. W. M., Jurisprudence, 1985, p.437.

[5] Ibid.

[6] Ibid., p.438.

man can possess", he said, "is the right always to do his duty".[7] Duty is the core of law. It is the means of securing that each one fulfils his part in the furtherance of social solidarity.
Durkheim was other leading sociologist who sought to theorise solidarity in the context of individuality of its individual members in a society. He postulated "a complex set of relationships between the individual and society. The two are mutually dependent and reinforce each other."[8] He asserted that "over the course of social evolution individuality and solidarity have simultaneously grown stronger."[9] He differentiated between two forms of solidarity; mechanical solidarity and organic solidarity. Mechanical solidarity was the feature of homogenous societies and the organic solidarity was the feature of the heterogeneous societies. In heterogeneous societies solidarity rests on functional interdependence produced by the division of labour. Durkheim further stated that law in homogenous societies are repressive and law in heterogeneous societies are restitutive. Durkheim's thesis has been criticised for variety of reasons. It has been criticised as being based on *a priori* thinking which does not have satisfactory substantiation based on empirical data.[10] His characterisation of homogenous societies as holding repressive laws and the heterogeneous societies as holding restitutive laws have also been criticised as unsubstantiated by empirical data in various studies done.[11]

III. Solidarity in International Law

Solidarity in international law has been a subject of enriching theoretical examination by some of the eminent philosophers like Vattel and Georges Scelle. Vattel made assertions of solidarity at international level based on the law of nature as applied to the sovereign states. He declared that an eternal and immutable law of nature obliged a state not only to respect and to treat other states as equals but also to provide mutual aid so far as that other stands in real need of its assistance. He further asserted that "nations ought mutually to respect each other, to abstain from all offence, from all injury, from all wrong, —in a word, from everything that may be of prejudice to others".[12] Vattel centred his thesis of international law (which he described as laws of nations) around the principles of law of nature and by the implications of the applicability of law of nature he found in international law the elements of solidarity. As an illustration reference may be made to, *inter alia,* principle for settlement of dispute between nation states, which most vividly exemplifies values of solidarity. Vattel notes:

> "A sovereign ought, in all his quarrels, to entertain a sincere desire of rendering justice and preserving peace. He is bound, before he take up arms, and also after having taken them up, to offer equitable conditions: and then alone he is justifiable in appealing to the sword against an obstinate enemy who refuses to listen to the voice of justice or equity"[13]

His reference to justice, equity and justifiability even in situations of war reflects the elements of solidarity in the principles of international law.

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[7] Scelle, George, *Précis de Droit de Gens: principes et systématique,* Paris: Recueil Sirey, 1932; Navari, Cornelia, "The Recovery of Vitoria and Suarez, and the Apprehension of a World Society: Krabbe, Verdross and Leon Duguit" in *The International Society Tradition: From Hugo Grotius to Hedley Bull*, Palgrave Macmillan, 2021, p.113.

[8] Pope, Whitney, and Barclay D. Johnson. "Inside organic solidarity", *American Sociological Review* (1983), 681-692.

[9] Ibid.

[10] Freeman, Michael DA. *Lloyd's introduction to jurisprudence*, London: Sweet & Maxwell, 1994, p. 667.

[11] Ibid., p.669.

[12] Vattel, Emer de, *The Law of Nations*, Indianapolis: Liberty Fund, 2008 (1758), Section 72, Book II.

[13] Ibid., Section 336, Book II.

Vattel found elements of solidarity in international law, but this solidarity is not so expansive as to make the international law or any of the international organisations created under the international law the sovereign. Unlike Vattel, Scelle found solidarity at international level in the era of internationalism so expansive and so inevitable that he declared the international law as the sovereign. Since the notion of state sovereignty was incompatible with the sovereignty of international law, in Scelle's view, it was set to demise in the era of internationalism. He believed that internationalism was a normal and probable outcome of scientific and technical progress and the development of trade relations. Internationalism generates international social solidarity and interdependence of states. In such an interconnected and interdependent global society, Scelle found the prevalence of hierarchy of legal rules in which the international law was superior to national laws. The principle of hierarchy of legal rules, with the international law at the top was based on his postulation that "every superior legal system necessarily conditions lower legal systems in such a way that the law of universal society … governs national laws just as national laws govern local laws in accordance with the principle of federalism encapsulated in the saying "*Bundesrecht bricht Landesrecht*."[14] The hierarchy of legal rules further implied that "universal solidarity requirements are superior to that of partial (including national) solidarities. This is equivalent to saying that the interests of the universal community take precedence over national interests."[15]

a. Functional Approach to Solidarity at International Level

Vattel's approach to solidarity in the context of Laws of Nations and Scelle's approach to solidarity in the context of international law are fundamentally different to each other, but still there is one similarity between them. Both of them use the concept of solidarity to locate the rightful place of sovereignty in the politico-legal world order. In the case of Vattel, it is located in sovereign States; in the case of Scelle, it is located in international law. However, beyond the politico-legal context of the concept of solidarity, it is argued that solidarity as a societal process and phenomenon plays significant role in the society. In this context observations of Durkheim may be noted that "where social solidarity exists, in spite of its non-material nature, … shows its presence through perceptible effects".[16] What perceptible effects does solidarity produce in a society? Answer to this depends on the perspective from which it is viewed. From an apolitical and functional perspectives, the strength of solidarity in a given group depends on the degree of interdependence and the level of collectivism required to meet the challenges from within the group or the threats from outside the group. If there were no challenges from within the group or there were no threats from outside the group, the group solidarity will be lessened; further, if there was no significant interdependence among the group members, the group solidarity would be almost insignificant. This is so because, solidarity as a social process has problem solving attributes to the benefit of most in the group, if not for all in the group. Thus, apart from its political context, solidarity in any group has significant functional connotations in terms of more enhanced cooperation to solve the group problems and more attuned readiness to collectively meet any threats from outside the group, than what it may have been otherwise without solidarity. The key driving factors for the enhanced cooperation to solve group problems and for the attuned readiness to meet the threats from outside group are the key functional attributes of solidarity, i.e. the attributes through which solidarity manifests functionally. It is premised by the author that these key functional attributes

[14] Thierry, Hubert, "The Thought of Georges Scelle"*, European Journal of International Law* (1990), 193.

[15] Ibid.

[16] Durkheim, Émile, *The Division of Labour in Society*, WD Halls, 1984 (1893), as reproduced in Freeman, Michael DA. Lloyd's introduction to jurisprudence, London: Sweet & Maxwell, 1994, p.714.

of solidarity are interdependence, mutual well-being and fairness. If anyone of these elements fails to get manifested functionally and generally for all, the group solidarity collapses. Thus if there is no functional interdependence among the members of the group, solidarity shall collapse; similarly, if there is no confidence of mutual well-being or of fairness among the members of the group in general, the solidarity shall cease. Effective solidarity capable of creating perceptible effects manifests through these functional attributes and further it thrives on it. Thus, from a functional perspective, solidarity may be construed as "what it does and what it thrives on".

The trigger point for building up or consolidation of effective solidarity in a group-generally-devoid-of-it or deficient-of-it for one or other reason, may lie in some political, historical or socio-economic event of major consequence; but once consolidated up to a degree, solidarity promotes interdependence, mutual well-being and fairness to most in the group and thrives on the same. Effective solidarity so triggered and consolidated does not sustain in perpetuity immortally. It may get slackened, weakened and finally demolished with the arrest of any of its functional attributes or with the occurrence of some solidarity-eroding political, historical or socio-economic or such other sociological events. Solidarity effects political, legal and economic processes and institutions, but, in the words of Durkheim, "the study of solidarity lies within the domain of sociology".[17]

At the international level, the solidarity primarily manifests in the degree of interdependence which exists among the people of the world, either directly or through their political agents and also from the challenges which the people of the world face within the group from time to time. The first half of the twentieth century is known for militarily most destructive, economically most interdependent, technologically most connected and politically most aspirational world order than what had been ever in the past. It is argued that this world order of the first half of twentieth century triggered the consolidation of solidarity among the political and non-political actors of the world particularly from the perspectives of solving the problems of the world collectively. The most explicit expression of consolidation of solidarity at the international level triggered after the World War II is evident in the preamble to the Charter of the United Nations, when it states, "*we the peoples of the united nations determined* to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind … *have resolved to combine our efforts to accomplish these aims*".[18]

The latter half of the twentieth century saw expansive incorporation of functional elements of solidarity in various branches of international law. Some of the branches of international law where one finds elements of solidarity exquisitely laid out are the International Human Rights Laws, International Humanitarian Law, International Refugee Law, international laws relating to preservation and protection of global environment, international law relating to economic development and cooperation, international law of international organizations like UNO. The principle of solidarity in international law has played a dual role: responding to dangers or events (negative solidarity) and creating joint rights and obligations (positive solidarity).[19] Despite immense evidence of strands of solidarity in various branches of contemporary international law it is most often considered a "value driven principle" with a "strong ethical underpinning".[20] Such negative connotations to incorporation of principles of solidarity in various branches of international law may be partly because of the abstract nature of solidarity, but mostly because of the incomplete appreciation of the functional attributes of solidarity and their complex role in stating and expounding the rules of international law. The global society as a group where there is no known political sovereign to make law or enforce law, solidarity

[17] Ibid, p.715.

[18] Charter of the United Nations and Statute of the International Court of Justice, San Francisco, 1945 (emphasis added).

[19] Wellens, Karel, "Revisiting solidarity as a (re-)emerging constitutional principle: Some further reflections", in R. Wolfrum (ed.), *Solidarity: A structural principle of international law*, Berlin: Springer, 2010, pp. 3-54.

[20] Ibid., p.5.

has complex yet indispensable role in making of the law and strengthening the mechanisms for enforcement of the laws, not to an absolute level but to a fairly appreciable level. Instead of dismissing the incorporation of principles of solidarity in international law as "value driven principle with strong ethical underpinning", there is need to separate it from 'ethical underpinning, if any, and to appreciate it as integral to the making and the working of international law. Durkheim asserted that law was the 'visible symbol' of solidarity, and it can be studied through the study of law.[21]

IV. Solidarity in the ICSID Convention

The preamble to the ICSID Convention[22] notes some of the foundational precepts which emphatically reflects solidarity in the very idea and objectives of the ICSID. The first paragraph of the preamble to the Convention notes the consideration of the Contracting States for "international cooperation for economic development". The reference of International cooperation reflects the element of interdependence among all the Contracting States. Similarly, reference of economic development reflects the objective of mutual well-being of the contracting states. The phrase "international cooperation for economic development" also reflects the element of fairness, as the obligation for international cooperation is compensated by creating an international framework for promotion of economic development of all stakeholders. Thus, in the preamble to the Convention all three elements of solidarity – i.e. interdependence, mutual well-being and fairness – are evident. In other parts of the Convention these three elements are evident in various provisions of the Convention which are analysed here in below one by one. It may be apt to note here that none of these three elements are disjunctive connotation to other. They broadly connote three different cores, but they overlap *inter se* in their meaning and effect. Solidarity in the ICSID Convention is evident in the accumulated whole and systematic institutionalization of these three constituent elements; it is just for the sake of academic presentation that they have been analysed severally.

a. Mutual Well Being

In an international treaty (or convention), if the contracting states are considered to constitute a group-in-solidarity, every individual contracting state is a participant as well as beneficiary of the solidarity systematically instituted in the treaty. Participation is ensured in the form of interdependence; benefits are assured in the form of mutual well-being and fairness. This systematic institutionalization is more than mere reciprocity. Reciprocity creates a process (or system) of measured give and take. Solidarity creates a process of mutuality where there is collective participation for collective benefit of all. The essence and the fundamental objective of the ICSID Convention is to establish a system of collective participation and collective benefit. At its core, it seeks to promote international cooperation for economic development based on collectivism and mutuality. The enshrined purposefulness of international cooperation and economic development, both reflect undeniable value of mutual well-being for all the Contracting states. The ICSID tribunal in *Banro* case has beautifully captured the wellbeing which the ICSID Convention brings to the Contracting States as a group as well as to the international community in general. It observes:

[21] Durkheim, Émile, *The Division of Labour in Society*, WD Halls, 1984 (1893), as reproduced in Freeman, Michael DA. Lloyd's introduction to jurisprudence. London: Sweet & Maxwell, 1994, p.714.

[22] The Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 (hereinafter ICSID Convention).

> One of the main objectives of the mechanisms instituted by the Washington Convention was to put an end to international tension and crises, leading sometimes to the use of force, generated in the past by the diplomatic protection accorded to an investor by the State of which it was a national. Conversely, the investor never enjoyed the assurance of being able to benefit from the protection of its Government, since, as a rule, diplomatic protection is accorded at the discretion of the Government; the extent to which an investor benefited or did not benefit from the protection of its Government depended on the political situation and political relations between the two Governments. The Washington Convention introduced mechanisms to remedy this dual drawback that bring the private investor face to face with the host State and which avoid political confrontation between the host State and the State of which the investor is a national ... *once ICSID arbitration is available for settling a dispute related to a foreign private investment, diplomatic protection is excluded: the investor no longer has the right to seek diplomatic protection, and the investor's home State no longer has the right to grant the investor diplomatic protection.*"[23] (*Emphasis added*).

The mutual well-being of the individual Contracting States within the ICSID is evident in the participative and the democratic decision-making processes in the organizational and administrative matters of the ICSID. The Administrative Council which is the highest organizational body of the ICSID consists of one representative from each Contracting State.[24] Administrative Council takes every decision through democratic process, which in some crucial matter require a majority of two-thirds of the members of the Administrative Council.[25] Each member of the Administrative council has one vote and except for some matters which require a higher majority, all matters before the Council are decided by a majority of votes cast.[26] Secretary-General who is the principal officer of the ICSID is elected by the Administrative Council.[27] Article 14 (2) makes it mandatory for the Chairman to "pay due regard to the importance of assuring representation on the Panels of the principal legal systems of the world and of the main forms of economic activity"[28], as and when he exercises his power to designate persons to serve on the Panels.

Mutual well-being in ICSID is also evident in the preservation of the distinctiveness and autonomous character of the individual Contracting states. To explain this let us first examine whether solidarity in a group subsumes the distinctiveness and autonomous character of the individual members of the group-in-solidarity?

Solidarity brings in unity of approach and synergy in action for promotion of common and mutual interests of the group members; it does not subsume their individual identity and autonomy. Solidarity brings in elements of commonality, mutuality and interdependence; but it does not subsume the distinctiveness and autonomous character of its members. Any such subsuming process would destroy the very essence and the framework for the interdependence, mutual well-being, fairness; and so it is asserted that solidarity does not subsume the distinctiveness and autonomous character of the members of a group-in-solidarity. Preservation of distinctiveness and autonomous character of the individual members is one of the underlying principles of solidarity in a group. The preservation of distinctiveness and autonomous character of the individual members are particularly essential for sustainable and organic solidarity. A subsuming solidarity (or homogenizing solidarity) is contradiction in

[23] Banro American Resources, Inc. and Société Aurifère Du Kivu Et Du Maniema S.A.R.L. v. Democratic Republic of the Congo, ICSID Case No. ARB/98/7, Award of the Tribunal, September 1, 2000; para. 15.

[24] ICSID Convention, Article 4(1)

[25] Ibid., Article 6(1)

[26] Ibid., Article 7 (2)

[27] Ibid., Article 10(1)

[28] Ibid., Article 14 (2)

terms, as in such processes there would neither be element of interdependence nor mutuality in well-being. The very idea of interdependence or mutuality involves elements of togetherness amidst otherness. Homogenizing solidarity does not have this essential element of otherness. The non-homogenizing solidarity is necessary for any group-in-solidarity; it is abundantly necessary for bigger and more pluralistic societies; and it is indispensably necessary for any institution at the international level. It is almost impossible to conceptualize any international institution on the principles of solidarity without commitment to preserve distinctiveness and autonomy of the individual members of the group-in-solidarity.

Under the ICSID Convention there are various provisions which seek to promote unity of approach and synergy in action but at the same time affirms and preserves the distinctiveness and the autonomous character of each of the Contracting States. In this context reference may be made to the third paragraph of the preamble to the ICSID Convention which recognizes the significance of the national legal processes in the settlement of disputes between a Contracting State and the nationals of Other Contracting State. It recognizes that except for some disputes which may require the dispute settlement facilities under the Convention, in most other cases such disputes should be settled at the level of the national legal processes of the concerned Contracting state. This is emphatic affirmation to the significance of the autonomous character of each member of the group-in-solidarity and an explicit commitment to preserve them. The appreciation and recognition for the national legal processes is further affirmed in the Convention under Article 26 which allows a Contracting sate to "require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under the Convention."[29]

The commitment towards preservation of distinctiveness and the autonomous character of the individual contracting states are further evident in the absence of the compulsory jurisdiction of the ICSID. The jurisdiction of the Convention is subject to mutual consent by the parties to the disputes.[30] The requirement of consent is so fundamental within the ICSID framework that it has been stated as the cornerstone of the jurisdiction of the Centre.[31]

The commitment towards the preservation of distinctiveness and the autonomous character of the individual contacting states are further evident in the facilities extended for settlement of disputes. ICSID has facilities for arbitration, conciliation and now mediation methods for settlement of disputes.[32] The dispute settlement methods of the ICSID Convention are thus essentially non-judicial. The judicial method requires the litigants to necessarily submit to a prescribed system of substantive and procedural laws. The non-judicial methods in the nature of arbitration and conciliation facilitates enormous degree of party autonomy in the selection of the applicable substantive and procedural laws for settlement of disputes. These non-judicial methods are considered to bring expediency and simplicity in the overall dispute settlement under the ICSID Convention; but it may be noted that they also preserve the autonomy of the member states. It does not coerce the individual members to submit to any one system of substantive laws, or procedures or the court. Party autonomy in selection of the applicable laws of procedure as well as in the substantive laws are stated in various provisions of the Convention.[33]

Non-coercive measures and procedures promote distinctiveness and autonomy of the individual members of a group-in-solidarity. The non-coercive nature of the jurisdiction of the

[29] ICSID Convention, Article 26

[30] Ibid., Article 25

[31] International Bank for Reconstruction and Development, Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, available at <http://www.worldbank.org/ icsid/basicdoc/basicdoc.htm.> accessed 9 January 2021 (hereinafter the Report of the Executive Directors), para. 23.

[32] ICSID Convention, Article 1 (2) of the Convention reads as "The purpose of the Centre shall be to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention."

[33] Ibid., Articles 33, 42(1), 44

Centre is further evident in Article 25(4) of the Convention. It permits every Contracting State to notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre, either at the time of ratification, acceptance or approval of the Convention or at any time thereafter. The non-coercive nature of the ICSID Convention is further evident in Article 71 which allows every Contracting State to denounce the Convention by a written notice to the depository. The Table herein below summaries the mutual wellbeing assuring provisions of the ICSID Convention.

Table 1: Elements of Mutual Wellbeing

<table>
<tr><th>Solidarity Constituent</th><th colspan="2">Contextual connotations under the ICSID Convention</th><th>Provisions under the Convention</th></tr>
<tr><td rowspan="8">Mutual Wellbeing</td><td colspan="2">Promotion of International co-operation</td><td>Preamble to the Convention</td></tr>
<tr><td colspan="2">Promotion of Economic Development</td><td>Preamble to the Convention</td></tr>
<tr><td colspan="2">Democratic and participative decision making in the institutional and administrative matters</td><td>Articles 4(1), 6(1), 7(2), 10(1), 14(2)</td></tr>
<tr><td rowspan="5">Preservation of distinctiveness and autonomous character</td><td>Party autonomy in selection of applicable law of procedure and substantive laws</td><td>Articles 33, 42(1), 44, 71</td></tr>
<tr><td>Exhaustion of local remedies</td><td>Article 26</td></tr>
<tr><td>Consent based jurisdiction</td><td>Article 25(1)</td></tr>
<tr><td>Non-coercive nature</td><td>Article 25(4)</td></tr>
<tr><td>Provision to denounce the Convention</td><td>Article 71</td></tr>
<tr><td colspan="2">International Mechanism for settlement of investment disputes involving private nationals of the home state</td><td>Article 1(2)</td></tr>
</table>

b. Fairness

Fairness is a composite term which may include values of or state of justness, non-arbitrariness, reasonableness, impartiality, rationality, righteousness, institutional integrity. These connotations are non-disjunctive in nature and one or more of them together bring fairness in the system or the process. Various provisions under the ICSID Convention contain one or more of these values or seek to promote them.

The Convention differentiates between the administrative and organizational functions on the one side and the professional functions involving professional expertise on the other side. The administrative and organizational decision making of the ICSID is centred around the principles

of democratic and participative decision making. The professional decision making within the framework of the ICSID, either in the process of conciliation or arbitration, are centred around the principles of professional expertise, independence and integrity. In this context reference may be made to Article 14 of the Convention which state, "persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment". Explicit emphasis on recognized competence, high moral character and the capability for the independence of judgment clearly refers to high standard of procedural integrity and non-arbitrariness to ensure fairness for all stakeholders in the professional decision-making process of the ICSID.

Consent is the hallmark of the Convention. Once the consent has been given by the parties to invoke the jurisdiction of the Centre, in fairness to both the parties to dispute, it is prohibited for any of them to withdraw their consent unilaterally.[34] This prohibition on unilateral withdrawal of consent reflects the element of justness in the ICSID Convention.

It is often said that justice delayed is justice denied. An expeditious process to trigger the dispute settlement process and to render expeditious disposal of cases is critical for an effective and thus fair dispute resolution process. There are various provisions in the Convention to ensure expeditious registration of cases as well as time bound and prompt disposal of cases, which together bring in elements of fairness in the processes of the Centre. To this end reference may be made to various provisions under the Convention which seek to institute due expediency and promptness in the dispute settlement processes of the Centre like, forth-with,[35] as soon as possible,[36] within 45 days,[37] within 90 days,[38] promptly,[39] within 120 days.[40]

One of the necessary ingredients of any fair adjudicatory process is the effective mechanism for each of the disputant parties to present their cases including the provision to raise objections to the jurisdiction of the Centre. The Convention contains extensive and effective provisions for the parties to the dispute to present their cases and to raise objections to the jurisdiction of the Centre. In this context reference may be made to Articles 32(1) and 42(1) which allows a party to raise objections to the jurisdiction of the Centre in Conciliation and arbitration proceedings respectively and require the Centre to consider such objections. Procedural fairness in the proceedings of an arbitral tribunal are also evident in Article 45(1) of the Convention which state that "failure of a party to appear or to present his case shall not be deemed an admission of the other party's assertions".[41] Similarly Article 45(2) require the tribunal to notify a party to dispute to present his case before the tribunal and to further grant a period of grace to a party to present his case, except in cases where it is satisfied that the party concerned does intend to do so.

Robustness of the procedure, whereby it does not get derailed by the non-cooperation or non-participation of any one of the parties to the dispute, is another element of the procedural integrity. This procedural robustness is evident in Article 45(2) of the Convention which empowers the arbitral tribunal to render an award even in such cases where a party to the dispute fails to appear or present his case despite notification from the tribunal to do so. Procedural robustness is also evident in Article 46 of the Convention which empowers the tribunal to determine any incidental or additional claims or counterclaims arising directly out of the subject matter of dispute. The tribunal is also empowered under the Convention to

[34] Ibid., Article 25(1).

[35] Ibid., Articles 28(3), 36(3), 52(3).

[36] Ibid., Articles 29(1), 37(1).

[37] Ibid., Article 49(2).

[38] Ibid., Articles 30, 38, 51(2).

[39] Ibid., Article 49.

[40] Ibid., Article 52(2).

[41] Ibid., Article 45(1).

recommend any provisional measures to preserve the respective rights of the parties, which again reflects the procedural robustness.[42]

Article 48 (2) require the awards of the tribunal to be rendered in writing. The award so rendered by the tribunal should state the reasons upon which it is based and should deal with every question submitted to it for consideration.[43] The mandatory provision for the awards in writing and the requirement for stating the reasons for the awards are an outshining feature of the Convention which establishes the integrity as well as the robustness of the arbitral procedure and thus fairness in the process. Robustness of the arbitral proceeding held under the Convention is further evident in Article 53(1) that makes the award mandatorily binding on the parties and further provides that it shall not be subject to any appeal or other remedy except for those provided in the Convention.[44]

Every established adjudicatory process whether judicial or non-judicial provide for one or other kind of remedy like appeal or annulment against the decisions of an adjudicatory process. They also provide mechanisms for rectification of any clerical errors or for revision of decisions on the ground of discovery of any crucial fact afresh relating to the subject matter of the case. Such non-dogmatic approach to the adjudicatory decisions is institutionalized in every adjudicatory process as a matter of fairness to parties to the dispute. ICSID Convention also contains provisions for rectification of clerical or such other errors of similar nature in the awards rendered by a tribunal[45], for revision of award on the ground of discovery of some decisive fact[46] and for annulment of award on or more of the prescribed grounds.[47] These provisions seek to address the legitimate concerns of an aggrieved party to an award, and thus they essentially reflect the element of fairness in the arbitral process under the ICSID Convention. The Table herein below summaries the fairness assuring provisions of the ICSID Convention.

Table 2: Elements of Fairness

Solidarity Constituent	**Contextual connotations under the ICSID Convention**		**Provisions under the Convention**
Fairness	Professional Decision Making by persons of professional expertise and integrity etc.	Integrity and non-arbitrariness	Article 14
	Prohibition on unilateral withdrawal of consent	Justness	Article 25(1)
	Expeditious and time bound disposal of cases	Institutional integrity	Articles 28(3), 36(3), 52(3), 29(1), 37(1), 49(2), 30, 38, 51(2), 49, 52(2)
	Right to present their case effectively including provisions to		Articles 32(1), 42(1), 45(1), 45(2)

[42] Ibid., Article 47.

[43] Ibid., Article 48(3).

[44] Ibid., Article 53(1).

[45] Ibid., Article 49(2).

[46] Ibid., Article 51(1).

[47] Ibid., Article 52.

	raise objections to the jurisdiction of the Centre.	Justness and Procedural integrity	
	Power of the tribunal to grant a period of grace in certain cases		Article 45(2)
	Power to recommend provisional measures		Article 47
	Awards to be rendered in writing with the reasons based on which awards are rendered.	Rationality and procedural integrity	Articles 48(2), 48(3)
	Provisions for rectification, revision and annulment of award	Justness and righteousness	Articles 49(2), 51(1), 52(1)
	Power to render award if a party does not appear despite notification	Institutional robustness	Article 45(2)
	Binding nature of award		Article 53(1)
	Power to decide incidental or additional claims or counter claims	Institutional robustness and justness	Article 46

c. Interdependence

Interdependence, more so mutual interdependence is central to the idea of solidarity. Other than the preamble, the element of interdependence is evident in the provision of the financing of the Centre. Article 17 of the Convention states that any excess expenditure of the Centre that cannot be met out of the charges for the use of its facilities and other receipts, then the same shall be borne by Contracting States which are members in proportion to their respective subscriptions to the capital stock of the Bank …".[48] It is pertinent to note that sharing of excess expenditure by Contracting States are not in proportion to the scale of usage by the members but in proportion to the subscriptions to the capital stock of the International Bank for Reconstruction and Development (IBRD). This reflects an element of mutual interdependence unlike that of reciprocal interdependence.

Section 6 of the Convention contains provisions in respect of the status, immunities and privileges of the Centre, its officials, its property and records. It is made mandatory for all the Contracting States to honour the status, immunities and privileges of the centre, which reflects the element of collective responsibility based on the principle of interdependence. The element of collective responsibility is evident in Article 27 of the Convention which prohibits every Contracting State to "give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under the Convention …".[49] Article 54(1) further requires every Contracting State to recognize an award rendered pursuant to the Convention as binding and enforce the pecuniary obligations imposed by that award within their respective territories as if it were a final judgment of a court in that State. Article 69 mandates every

[48] Ibid., Article 17.

[49] Ibid., Article 27.

Contracting State to take such legislative or other measures as may be necessary for making the provisions of the Convention effective in its territories.

Table 3: Elements of Interdependence

Solidarity Constituent	Contextual connotations under the ICSID Convention		Provisions under the Convention
Interdependence	International cooperation for economic development		Preamble
	Expenditure sharing in certain cases	Collective obligation	Article 17
	Provisions relating to status, immunities and privileges of the Centre, its officials, its property and records	Collective responsibility	Section 6, Article 54(1)
	Prohibition to give diplomatic protection, or bring an international claim	Collective responsibility	Article 27, 69
	Obligation to recognize award as binding and enforce the pecuniary obligations	Collective responsibility	Article 54(1)
	Measures to make the Convention effective in respective countries	Collective responsibility	Article 69

The functional elements of solidarity are instituted in various provisions of the ICSID Convention. These elements are not just aspirational propositions, but they have been constituted within the framework of the ICSID Convention. Thus, the ICSID Convention is an expression of solidarity at international level amongst the member countries. It expresses interdependence, confidence of mutual well-being and fairness among the member states.

V. Legitimacy Crisis of the ICSID and the Solidarity instituted in it

A number of literatures have come which seriously question the legitimacy of investment treaty arbitration in general and even the ICSID Convention. As early as in 2004 Susan D. Franck highlighted the legitimacy crisis of investment treaty arbitrations arising out the lack of adequate sensitivity to the public interests and the inconsistent decisions of the arbitral tribunals.[50] Similarly Odumosu questions the ICSID's ability to respond to multiplicity of interests that arise in investment dispute settlement, especially in relation to Third World states and highlights trends

[50] Franck, Susan D. "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions." *Fordham L. Rev.* 73 (2004), 1521. See also Franck, Susan D. "The Nature and Enforcement of Investor Rights Under Investment Treaties: Do Investment Treaties Have a Bright Future." *UC Davis J. Int'l L. & Pol'y* 12 (2005), 47; Franck, Susan D. "Development and outcomes of investment treaty arbitration." *Harv. Int'l LJ* 50 (2009), 435.

which create pessimism in the relevance of ICSID to these countries.[51] Salacuse has raised concerns about the "cost to host countries of the arbitral process, and the constraints imposed thereby on the ability of governments to regulate enterprises in their territories."[52] Paul P Stephan raises the issue of privatization of international law in the area of international investments and highlights the risks of "radical instability" which may be brought about by the private actors.[53] Yackee highlights the legitimacy crisis of modern international investment law arising from "inconsistent arbitral decisions" and the fact that "this new common law of investment, has been placed primarily in the hands of an exceedingly small pool of super-elite, like-minded international lawyers", who have tendency to "interpret the vague language of BITs expansively in favour of new customary international legal rights for investors".[54]

Ideally, if the ICSID Convention is an expression of social solidarity at international level, the concerns and the legitimacy crises raised by the critics should not hold true, however, this is not so. To unravel this paradox, one needs to appreciate difference between the purposefulness of the ICSID Convention and the working of the arbitral tribunals and the annulment committees constituted under the Convention. The functional attributes of solidarity in the context of ICSID Convention broadly defines its purposefulness, principles and the legal precepts for its smooth and effective functioning. Except for an *a priori* objective to enhance the relevance of the Convention for all its stakeholders, solidarity does not *per se* cause or enhance perfection in the working of tribunals and committees constituted under the Convention or enhance the professional attributes and qualities of the arbitrators and conciliators appointed under the Convention. On a close scrutiny of the concerns raised by the critics of the ICSID Convention, it is found that most of them primarily relate to ways in which the arbitral tribunals and the annulment committees constituted under the ICSID Convention have functioned, the deficiencies thereof and how the functioning of these tribunals, the committees, the arbitrators and the conciliators may be improved further. It is further noticed that most of these critics while highlighting the concerns and challenges in the working of the ICSID Convention, have optimistically taken note the significance of the Convention in so many words. Susan notes that "wholesale abandonment or radical rejection of ICSID arbitration may not be warranted."[55] She advocates for "implementing a series of reform measures that could … enhance institutional integrity and promote procedural justice" and notes that "ICSID can and should be a model of fairness, efficiency, and justice in the field of international economic dispute resolution."[56] Similarly, Odumosu notes that "notwithstanding the troubled history of the Third World's engagement with the international law on foreign investment … Tecmed v. Mexico represents the first significant engagement with the activities of Third World peoples in ICSID jurisprudence. It could signal the beginning of an era where peoples' concerns and activism come to light in investment dispute settlement".[57] Salacuse while highlighting some of the threats to the emerging global regime for investment particularly the ICSID Convention, notes that this regime "has been painstakingly constructed over the last sixty years", which needs "wise management and flexible leadership".[58] Stephan refers to the emerging international investment law as the one that "provides a valuable, and perhaps

[51] Odumosu, Ibironke T. "The antinomies of the (continued) relevance of ICSID to the third world." *San Diego Int'l LJ* 8 (2006), 345

[52] Salacuse, Jeswald W. "Is There a Better Way-Alternative Methods of Treaty-Based, Investor-State Dispute Resolution." *Fordham Int'l LJ* 31 (2007), 138.

[53] Stephan, Paul B. "Privatizing international law." *Virginia Law Review* (2011), 1573-1664.

[54] Yackee, Jason Webb. "Pacta Sunt Servanda and State Promises to Foreign Investors Before Bilateral Investment Treaties: Myth and Reality." *Fordham Int'l LJ* 32 (2008), 1550.

[55] Franck, Susan D. "The ICSID Effect-Considering Potential Variations in Arbitration Awards." *Va. J. Int'l L.* 51 (2010), 825.

[56] Ibid.

[57] Odumosu, Ibironke T. "The Law and Politics of Engaging Resistance in Investment Dispute Settlement." *Penn St. Int'l L. Rev.* 26 (2007): 251.

[58] Salacuse, Jeswald W. "The emerging global regime for investment." *Harv. Int'l LJ* 51 (2010), 427.

essential, tool for managing an increasingly interconnected world".[59] Similarly, Yackee while highlighting the problems in the working of arbitral tribunals in the international investment arbitration, nowhere contests the legitimacy of the ICSID Convention, but advocates for an alternate "minimalist system of international investment law".[60]

Thus, it is argued that none of the critics raising the legitimacy crises or concerns in the context of the international investment arbitrations question the fundamental objectives, purposefulness and the basic precepts of the ICSID Convention which express solidarity at the international level. The ICSID Convention may be an expression of solidarity at the international level, but this solidarity does not *per se* bring perfection in the working of the tribunals constituted under the Convention or the perfection of the laws applied by these tribunals. Solidarity may not bring perfection in the working of arbitral tribunals, but if the imprints of imperfection remain rampant and unaddressed, it may erode the attributes of solidarity in the ICSID Convention and in due course of time may make it irrelevant altogether. Some of the major solidarity eroding factors and trends in the working of the ICSID Convention are as follows:

a. Inconsistency in interpretational approaches

One of the most worrisome areas of working of the ICSID Convention is the inconsistency in interpretational approaches and techniques adopted by various ICSID tribunals. An arbitral tribunal constituted under the Convention has the onerous responsibility of interpreting the provisions of various sources of law including the BITs, the multilateral treaty provisions like the ICSID Convention itself, the Statutory provisions of the domestic laws, the agreements between the parties of the arbitration etc. Article 28 of the Vienna Convention on the Law of Treaties clearly lays down the applicable rules for interpretation of treaty provisions. These provisions of the Vienna Convention apply as much to arbitral tribunals constituted under the ICSID Convention, as it applies to any other international juridical body established under any treaty or Convention. There does not seem to be strict compliance with the provisions of the Vienna Convention by the arbitral tribunals giving rise to interpretational approaches which have ranged from being extreme liberal to strict, very narrow or very broad, from textual to contextual and yet another from being teleological to value-neutral. Say for example the term 'foreign control' under Article 25(2)(b) has been interpreted broadly in the *Tokios* jurisdiction case[61] unlike the term 'investment' which has been interpreted narrowly or restrictively in a number of decisions like *Malaysian Historical Salvors* award case.[62] Similarly, in *TSA Spectrum de Argentina S.A* award case[63] the tribunal exempted the requirement of exhaustion of local remedies under Article 26 of the Convention as being 'highly formalistic' and 'meaningless' on the facts and circumstances of the case whereas in the *Wintershall* award case[64] the tribunal declined to ignore the same condition, irrespective of the prevailing facts and circumstances of the case, just because it was textually stated in their agreement. An ICSID arbitral tribunal in the *Ambiente* jurisdiction case[65] ignored the condition requiring the exhaustion of local

[59] Stephan, Paul B. "Privatizing international law." *Virginia Law Review* (2011), 1573.

[60] Yackee, Jason Webb. "Pacta Sunt Servanda and State Promises to Foreign Investors Before Bilateral Investment Treaties: Myth and Reality." *Fordham Int'l LJ* 32 (2008), 1550.

[61] Tokios Tokeles v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction, April 29, 2004 (hereinafter Tokios jurisdiction case)

[62] Malaysian Historical Salvors SDN, BHD v. The Government of Malaysia, ICSID Case No. ARB/05/10, Award on Jurisdiction, May 17, 2007 (hereinafter Malaysian Historical Salvors award case)

[63] *TSA Spectrum de Argentina S.A. v. Argentina Republic* (ICSID Case No. ARB/05/5) Award, December 19, 2008

[64] Wintershall Aktiengesellschaft v. Argentine Republic (ICSID Case No. ARB/04/14) Award, December 8, 2008 (hereinafter Wintershall award case)

[65] Ambiente Ufficio S.p.A. v. Argentine Republic (ICSID Case No. ARB/08/9) Decision on Jurisdiction and Admissibility, February 8, 2013 (hereinafter Ambiente jurisdiction case)

remedies again as a futile exercise, whereas in the *Daimler* award case,[66] another ICSID tribunal found the fulfilment of the condition requiring exhaustion of local remedies necessary and obligatory.

The most vivid difference in approach of various arbitral tribunals is evident in interpretation of the term investment for the purposes of Article 25(1) of the Convention. The evolution of *Salini* test enunciated in the *Salini-Morocco* jurisdiction case[67] with *inter alia,* the economic development as its key feature is based on the teleological approach to the meaning and scope of the term investment under Article 25(1) of the Convention, by putting it in the teleological perspectives of the preamble to the Convention. Some of the cases where the *Salini* test has been followed are *Malaysian Historical Salvors* award,[68] *Joy Mining* award,[69] *Bayindir* jurisdiction case.[70] Unlike this a number of other tribunals have adopted strictly subjective approach to the determination of meaning and scope of the term investment under Article 25(1) of the Convention, primarily on the basis of absence of any such definition in the Convention. Some of the cases where the subjective approach has been adopted are the *Fedax* jurisdiction,[71] *Tradex* award,[72] *Mihaly* award,[73] *Azurix* jurisdiction cases.[74] The tribunals adopting the subjective approach to the determination of the meaning and scope of investment have relied on the Report of the Executive Directors on the Convention, whereas the tribunals following the *Salini* test have followed economic development imperatives of the Convention as found in its Preamble.

Again with respect to umbrella clauses in the BIT, the arbitral tribunals have followed approaches ranging from textual to contextual. The textual approach to umbrella clause is evident in *Noble Ventures* award[75] and the *Duke* award cases[76]; whereas contextual approach to umbrella clause is evident in the *SGS-Philippines*[77]*, EDF* award,[78] *Alpha* award[79] and the *Impregilo* jurisdiction cases.[80]

In most of these cases the arbitral tribunals have relied upon one or other decision or juristic writing including the Report of the Executive Directors on the Convention to adopt one approach

[66] Daimler Financial Services AG v. Argentina (ICSID Case No. ARB/05/1) Award, August 22, 2012 (hereinafter Daimler award case)

[67] Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001 (hereinafter Salini-Morocco jurisdiction case)

[68] Malaysian Historical Salvors SDN, BHD v. The Government of Malaysia, ICSID Case No. ARB/05/10, Award on Jurisdiction, May 17, 2007 (hereinafter Malaysian Historical Salvors award case)

[69] Joy Mining Machinery Limited v. The Arab Republic of Egypt (ICSID Case No. ARB/03/11) Award on Jurisdiction, August 6, 2004 (hereinafter Joy Mining award case)

[70] Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan (ICSID Case No. ARB/03/29) Decision on Jurisdiction, 14 November 2005 (hereinafter Bayindir jurisdiction case)

[71] Fedax N.V. v. Republic of Venezuela (Case No. ARB/96/3) Decision on Jurisdiction, July 11, 1997 (hereinafter Fedax jurisdiction case)

[72] Tradex Hellas S.A. (Greece) v. Republic of Albania (ICSID Case No. ARB/94/2) Award, April 12, 1999 (hereinafter Tradex award case)

[73] Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka (ICSID Case No. ARB/00/2) Award, March 15, 2002 (hereinafter Mihaly award case)

[74] Azurix Corp. v. The Argentine Republic (ICSID Case No. ARB/01/12) Decision on Jurisdiction, December 8, 2003.

[75] Noble Ventures, Inc. v. Romania (ICSID Case No. ARB/01/11), Award, October 12, 2005

[76] Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador (ICSID Case No. ARB/04/19) Award, August 18, 2008

[77] SGS Société Générale De Surveillance S.A. v. Republic of the Philippines (ICSID Case No. ARB/02/6) Decision of the Tribunal on Objections to Jurisdiction, January 29, 2004 (hereinafter SGS-Philippines jurisdiction case)

[78] EDF (Services) Limited V. Romania (ICSID Case No. ARB/05/13) Award, October 8, 2009 (hereinafter EDF award Case)

[79] Alpha Projektholding GMBH v. Ukraine (ICSID Case No. ARB/07/16) Award, November 8, 2010 (hereinafter Alpha award case)

[80] Impregilo S.P.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/3, Decision on Jurisdiction, April 22, 2005 (Impregilo jurisdiction case)

in preference to the other, but one does not readily find reasons in such awards or decisions as to why one juristic writing or arbitral decision has been has been preferred over the other.
In terms of Article 32 of the Vienna Convention on the Law of Treaties, the preparatory work of the treaty is a "supplementary means of interpretation". The preamble to the treaty, under Article 31(1) of the Vienna Convention on the Law of Treaties, is stated as a primary means of interpretation. However, the manner and extent to which the idea of economic development, otherwise so prominently stated in the preamble of the convention, has been ignored while interpreting the key concepts like 'investments' 'foreign control' 'nationality' under Article 25 of the Convention, one finds that Article 32 of has been preferred over Article 31(1) of the Vienna Convention as interpretational tool by a number of ICSID arbitral tribunals, allowing such tribunals to cherry-pick precedents or the juristic writings.
There are some cases where one finds strict adherence to Vienna Convention and the other rules of that nature in interpreting the key concepts of the ICSID Convention. An illustration to this one finds in the *Wintershall* award case, where while deliberating on a number of concepts of the Convention the tribunal went by the rules of Article 31 of the Vienna Convention in preference to writings on the preparatory work, the precedents or such other juristic writings. However, this approach of the *Wintershall* award case vis-à-vis Article 31 of the Vienna Convention is rare in decisions and awards of many arbitral tribunals.

b. Inconsistencies in Fundamental Concepts of the Convention

Like most other established systems of the legal dispute resolution the ICSID system too have some fundamental concepts on which its institutional success in attaining its defined objectives depend. Article 25 of the Convention, *inter alia,* contain some of such fundamental concepts like investment, national of another Contracting State, foreign control, consent etc. Even after five decades of its functioning and more than two hundred awards rendered under the Convention one finds inescapable inconsistencies in the conceptual understanding, meaning, scope, legal consequences of some of these fundamental concepts.[81] The term investment is possibly the most central to the working of the ICSID system because of the connect which carries between the jurisdiction of the Centre and the objectives of the Convention. As an illustration to highlight various kinds of inconsistencies and incoherence in dealing with the fundamental concepts, such inconsistencies with respect to the term 'investment' has been stated here.
On an examination of various cases dealing with the meaning and scope of the term investment, one finds its interpretation ranging from extreme subjective approach to extreme objective approaches,[82] besides a number of other median interpretational approaches. One is reminded of *Fedax* jurisdiction case[83] where the arbitral tribunal observed that the parties have *"large measure of discretion to determine for themselves whether their transaction constitutes an investment for the purposes of the Convention"* indicating the term 'investment' under Article 25(1) of the Convention has no inherent meaning of its own and so its scope and constitution is

[81] Franck, Susan D., "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions", 73 *Fordham L. Rev.* 1521, (2005) (surveying inconsistent decisions in investment treaty arbitration and concluding that concludes that, in applying inconsistent legal standards, the international arbitration process itself "creates uncertainty." See also Kalb, Johanna "Comment: Creating an ICSID Appellate Body", 10 *UCLA J. Int'l L. & For. Aff.* (2005) 179, (examines the current body of ICSID cases to demonstrate that there are significant inconsistencies around key issues of international investment law interpretation and explains in greater detail why this trend toward inconsistency threatens the fundamental purpose of bilateral investment treaties.)

[82] See Ambiente Ufficio S.p.A. v. Argentine Republic (ICSID Case No. ARB/08/9), Para. 466. (Observing that "… both on the judicial and the academic levels, there is much controversy on the meaning to be given to the term "investment" in Art. 25 of the ICSID Convention and on whether to construe it broadly or restrictively.)

[83] Fedax N.V. v. Republic of Venezuela (Case No. ARB/96/3) Decision on Jurisdiction, July 11, 1997 (hereinafter Fedax jurisdiction case)

determinable by the parties. This kind of subjective approach to the term investment under Article 25(1) of Convention was adopted by a number of ICSID arbitral tribunals like *Tradex* award case[84], *Mihaly* award case,[85] *CMS* jurisdiction case,[86] *Azurix* jurisdiction case,[87] *Tokios* jurisdiction case,[88] *SGS-Pakistan* jurisdiction case,[89] *ATA* award case.[90] Unlike the subjective approach in these cases, the tribunal in *Salini-Morocco* jurisdiction case[91] observed that the term investment under Article 25(1) of the Convention has three objective conditions like "contributions, a certain duration of performance of the contract and a participation in the risks of the transaction". Further taking note of the Preamble to the Convention, the tribunal added the fourth characteristic feature of investment i.e. "…the contribution to the economic development of the host State of …" These characteristics to assess the investment came to be called the *Salini* test. A number of ICSID tribunals have followed this objective test like *Joy Mining* award case,[92] *Dipenta* award case,[93] *Bayindir* jurisdiction case,[94] *Helnan* jurisdiction case,[95] *Malaysian Historical Salvors* award case.[96] In another set of cases like *Biwater* award case,[97] *Alpha* award case,[98] *Phoenix* award case,[99] *Pantechniki* award case[100] the ICSID tribunals adopted an approach different from the objective or subjective approach.

Besides the Convention based concepts like investment, national of another Contracting State, foreign control etc. one finds similar kind of inconsistencies in treatment of BIT based concepts like umbrella clauses, or the agreement forum selection clauses. A uniform approach to these legal concepts besides being important for determining the jurisdiction of the centre are also significant because the very institutional objectives and the legitimacy of the ICSID Convention depends on the kind of interpretation and effect is accorded to these concepts. Unfortunately, one does not find a pattern of uniformity and consistency in the arbitral decisions and awards of

[84] Tradex Hellas S.A. (Greece) v. Republic of Albania (ICSID Case No. ARB/94/2) Award, April 12, 1999 (hereinafter Tradex award case)

[85] Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka (ICSID Case No. ARB/00/2) Award, March 15, 2002 (hereinafter Mihaly award case)

[86] CMS Gas Transmission Company v. The Republic of Argentina (ICSID Case No. ARB/01/8) Decision of the Tribunal on Objections to Jurisdiction, July 17, 2003 (hereinafter CMS jurisdiction case)

[87] Azurix Corp. v. The Argentine Republic (ICSID Case No. ARB/01/12) Decision on Jurisdiction, December 8, 2003.

[88] Tokios Tokeles v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction, April 29, 2004 (hereinafter Tokios jurisdiction case)

[89] SGS Société Générale De Surveillance S.A. v. Islamic Republic of Pakistan (ICSID Case No. ARB/01/13) Decision of the Tribunal on Objections to Jurisdiction, August 6, 2003 (hereinafter SGS-Pakistan jurisdiction case)

[90] ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan (ICSID Case No. ARB/08/2) Award, May 18, 2010 (hereinafter ATA award case)

[91] Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001 (hereinafter Salini-Morocco jurisdiction case)

[92] Joy Mining Machinery Limited v. The Arab Republic of Egypt (ICSID Case No. ARB/03/11) Award on Jurisdiction, August 6, 2004 (hereinafter Joy Mining award case)

[93] L.E.S.I.–DIPENTA v. Algeria (ICSID Case No. ARB/03/8) Award, January 10, 2005

[94] Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan (ICSID Case No. ARB/03/29) Decision on Jurisdiction, 14 November 2005 (hereinafter Bayindir jurisdiction case)

[95] Helnan International Hotels A/S, v. The Arab Republic of Egypt (ICSID Case No. ARB 05/19) Decision Of The Tribunal on Objection to Jurisdiction, October 17, 2006, (hereinafter Helnan jurisdiction case)

[96] Malaysian Historical Salvors SDN, BHD v. The Government of Malaysia, ICSID Case No. ARB/05/10, Award on Jurisdiction, May 17, 2007 (hereinafter Malaysian Historical Salvors award case)

[97] Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania (ICSID Case No. ARB/05/22) Award, July 24, 2008 (hereinafter Biwater award case)

[98] Alpha Projektholding GMBH v. Ukraine (ICSID Case No. ARB/07/16) Award, November 8, 2010 (hereinafter Alpha award case)

[99] Phoenix Action Ltd. v. The Czech Republi (ICSID Case No. ARB/06/5) Award, April 15, 2009 (hereinafter Phoenix award case),

[100] Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania (ICSID Case No. ARB//07/21) Award, July 30, 2009

the ICSID tribunals with respect to these key concepts, which is worrisome. It is worrisome from the perspective of solidarity as it exposes the stakeholders to unpredictable, inconsistent and uncertain jurisprudence which hampers the elements of institutional integrity and justness which are fundamental to fairness.

c. Orientational Biases within ICSID

Other solidarity eroding factor may be biases in the decision-making processes of the tribunals or the *ad hoc Committees* constituted under the ICSID Convention. Usually biases in decision making are difficult to prove, so the adjudicatory systems across the world tend to adopt principles and processes to rule out any possibility of biases right away. So, principles like no one would be judge in one's own cases, or principle of avoidance of conflict of interests are celebrated doctrines in any adjudicatory process including under the ICSID Convention. Under the Convention, there are sufficient measures in place to rule out any scope of biases in arbitral decision making; nonetheless there remain some area of orientational biases within the ICSID framework.
In the case of ICSID Convention, there is stark imbalance in the control of authorship of arbitral jurisprudence and the stakes in the authored jurisprudence. Degree of imbalance is so high and so entrenched that it can't be ignored at least from the perspective of participative decision making and thus from the perspective of solidarity. This imbalance is evident in the region wise distribution of panel of arbitrators, conciliators and the members of the *ad hoc* Committees vis-à-vis the region wise distribution of the respondent states in arbitral, annulment and conciliation cases. The table below gives the region-wise distribution.

Table 4: Region-wise distribution of panel of Arbitrators, conciliators and the members of the *ad hoc* Committees and the State Party to the Dispute till the Fiscal Year 2020

Region	Persons appointed as Arbitrators, Conciliators or *ad hoc* Committee Members[101]	State Party to the Dispute in ICSID Cases registered[102]
Western Europe	47%	8%
North America	20%	4%
Western Europe and North America	67%	12%
Rest of the world[103]	33%	88%

It is noticeable in this Table that the Western Europe has the highest contribution of persons appointed as Arbitrators, Conciliators or Members in ICSID Centre proceedings. It is followed by North America, and both these regions together account for almost two thirds of the Arbitrators, Conciliators or Members appointed in ICSID proceedings. Unlike this, countries of the Western Europe have faced arbitral claims in just 8% of the cases, the countries from North America have faced such claims in just 4% of such claims, and the countries from remaining

[101] 'The ICSID Caseload – Statistics (Issue 2020 – 2), p 17.

[102] Ibid., p. 12

[103] Includes countries from other regions of the world like South America, Central America & Caribbean, Middle East & North Africa, Sub Saharan Africa, South & East Asia & the Pacific, Eastern Europe & Central Asia

parts of the world have faced as Respondent States in as much as 88% of the claims. The countries facing the enormous number of ICSID cases as the State Parties to the dispute or as the Respondent State have just around one third of their nationals appointed as arbitrators, conciliators or the *ad hoc* Committee member. This division of the globe in two blocks i.e. the North America and the Western Europe in one block and the remaining countries of the world in the other block broadly coincide with the block of the developed countries and the block of the developing and the underdeveloped countries respectively. If this division of the two blocks be taken as the division on the basis of the developmental divide, then one finds that countries from the developed block face arbitral dispute of the tune of 12% and commands the arbitral authorship in the decision making process to the tune of 67% whereas the countries from the block of the developing or the underdeveloped countries face cases to the tune of 88% as against the arbitral authorship merely to the extent of 33%.

Appreciating the fact that it is the Arbitrators, Conciliators and the Members of the *ad hoc* Committees which in long term evolve and shape up the institutional jurisprudence for the decision-making processes under the ICSID Convention, it is a matter of concern that the developed countries facing just 12% of the investor claims, command decision making authority and the jurisprudential authorship in the dispute resolution process to the extent of 67%. Conversely Countries from the developing and the underdeveloped block face 88% of the total claims and command decision making authority and jurisprudential authorship to the extent of just 33%. At least statistically these figures establish the lopsided structure of the ICSID arbitral process that too on the axis of the developmental divide. One may argue this lopsided structure does not affect the impartiality of the decision-making process of the arbitral tribunals.

Even if it is assumed that the appointment of a national as Arbitrator, Conciliator and Member are absolutely impartial and independent in decision making, yet even the staunchest believer in the impartiality of the ICSID system would concede, it does have enormous indirect, creeping influences in the overall decision-making process of the ICSID arbitral tribunals and its jurisprudence. Say for example, if significant number of persons from a specific region like Western Europe is appointed as arbitrator, it will unavoidably give rise to a western oriented ICSID jurisprudence to the general advantage of the Countries from this block. Such long term influences arising out of the overwhelming participation of European people in the key responsibilities of the institutions has often been called as ‘euro-centric’, because of obvious imprints of European influences in the development of the International Law.[104] Such kinds of indirect and creeping biases which come in any system because of overwhelming participation of individuals who share something in common, be it region or status of development, bring subtle, not so starkly obvious Orientational Biases in the decision making process of the Institution. Assuming such people to be persons of established integrity and independent judgment, at the stage of any specific decision making such biases may not be so obvious, however in the long term covering many decisions the trends of such orientational biases may get obvious. Orientation Bias factor in the nature as stated here can be numerically calculated. The Table herein below calculates the orientation bias factor based on the percentage of arbitrators, conciliators, members vis-à-vis the number of respondent states till the year 2020 from the two regional blocks of North America and Western Europe on the one side and rest of the world on the other side.

[104] Bedjaoui, Mohammed, *Towards A New International Economic Order*, New York: Holmes and Meier, 1979 (highlighting the issue of euro centric nature of International Law as the one made by “a small 'syndicate of states' which for several hundred years has projected 'its' dominating law on to the international scene, imposing it as 'the' international law governing the whole world.") see also Anand, R. P., *Confrontation or Co-operation? International Law and Developing Countries*, New Delhi: Banyan Publications, 1987, 103-128. See generally Snyder, F. and Sathirathaieds, S., *Third World Attitudes Towards International Law* (Brill 1987); Hossam Issa, International Commercial Arbitration: A Study Mechanisms of International Legal Dependency (1984).

Table 5: Orientational Bias Factor in Percentage on Developmental line till FY 2020

	% of Arbitrators, Conciliators, Members appointed till 2020 from the region[105] **A**	% of cases in which impleaded as Respondent till (the year 2020)[106] **B**	Orientational Bias **F = (A/B)**	Orientational Bias Factor in Percentage **$F(\%) = (F_i \times 100)/ (F_i + F_{ii})$**
North America & Western Europe	67%	12%	5.583	93.7%
Other Regions	33%	88%	0.375	6.3%

The Orientational bias factor as stated above is primarily for the reasons of the historical facts in which the ICSID has evolved. Euro-centric character of international law is a historical fact which has influenced *inter alia* the ICSID as well. In case of ICSID there is no evidence that the orientational bias has been created and sustained by the countries of the Western Europe or North America. On the contrary there are evidences that it is the respondent states from the non-Western Europe and non-North America which appoint arbitrators, conciliators and members of the *ad hoc* Committee countries from the Western Europe and North America in preference to those from their own regions. Accordingly, it is concluded that the orientational bias evident in the ICSID is only for the historical fact and as the world becomes balanced in terms of knowledge and expertise of international law, the orientational biases shall vanish. In this context it may be noted that there is trend of diminishing of orientational bias factors. Based on the *ICSID Case Load - Statistics (Issue 2013-I)* it may be found that the orientation bias factor till the year 2012 was 97.09% for Western Europe and North America combine and 2.92% for the regions of the rest of the world; which has by 2020 balanced out to become 93.7% and 6.3% respectively. Based on this trend of diminishing orientational bias it is hoped that at some point of time in future the orientational biases shall disappear. As the orientational bias factors gets more balanced in years to come, it will reflect true participation of all stakeholders in the jurisprudence making exercise of ICSID and thus wholesome institutionalization of solidarity in the ICSID framework. Until then, howsoever benign it may be, the orientational bias factors statistically evident in the ICSID processes run counter to the principle of solidarity in the ICSID Convention.

VI. Conclusion

The paper titled “Solidarity in the ICSID Convention: An Exploration” examines the ICSID Convention from the perspective of solidarity. The theoretical formulations and philosophical underpinnings of solidarity in international law is very divergent. There is no unanimous view as to precise meaning and mechanisms for institutionalization of solidarity in international law.

[105] The ICSID Case Load – Statistics (Issue 2020-2), Arbitrators, Conciliators and ad hoc Committee Members Appointed in ICSID Cases, p. 17.

[106] The ICSID Case Load – Statistics (Issue 2020-2), Geographic Distribution of All ICSID Cases by State Party Involved, p. 12.

Accordingly, for the purposes of examination of solidarity within the framework of the ICSID a functional approach to solidarity is taken and it is premised by the author that it consists of three elements – interdependence, mutual wellbeing and fairness. The ICSID Convention is elaborately studied to map these three elements of solidarity in various provisions. It is found that these three elements are richly present in various provisions of the ICSID Convention. Based on this finding it is concluded that solidarity is an integral and constituent element of the ICSID Convention. The paper further examines the issues of legitimacy crises and concerns raised by many critics with respect to the international investment law in general and ICSID Convention in particular. It is found that none of these concerns and crises relate to the fundamental objectives, purposefulness and precepts of the ICSID Convention but they primarily relate to the deficiencies in the working of the arbitral tribunals and the annulment committees constituted under the Convention. Thus, it is argued thereof that these critics do not *per se* negate the attributes of solidarity in the ICSID Convention. The paper further examines the trends and practices in the functioning of the ICSID Convention which may weaken the element of solidarity. It is found that there are trends of inconsistencies in the interpretational approaches of the arbitral tribunals and in interpretation of the fundamental concepts within the ICSID Convention. Such interpretational inconsistencies expose the stakeholders to unreliable, inconsistent and unpredictable decision-making process which is contrary to institutional integrity and other elements of solidarity. Interpretational inconsistencies in the decision-making processes thus have effects of eroding solidarity of the ICSID framework. It is also found that there are elements of orientational biases in the decision-making processes of the ICSID tribunals, annulment committees and conciliation. Such orientational biases may be essentially because of the historical facts. If the arbitrators, conciliators and members of the annulment committees are impartial and independent, such orientational bias may not affect decision making in any one specific case, nonetheless, over a period of long duration covering many cases, they do have strong influence in the evolution of the jurisprudence around ICSID Convention. Continued existence of such orientational biases in the ICSID framework particularly along the developmental divide is contrary to the principle of solidarity and may erode it. However, the paper finds that there is trend towards diminishing of the orientation biases and hopes that at some point of time in history these orientational biases shall disappear. As the orientational bias factors gets more balanced in years to come, it will reflect true participation of all stakeholders in the jurisprudence making exercise of ICSID and thus wholesome institutionalization of solidarity in the ICSID framework.