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Should India reconsider signing ICSID Convention?

Authored By: Rupal Agrawal[1]

Abstract

World Bank has provided International Centre for Settlement of Investment Disputes (ICSID) as a forum for the settlement of disputes related to investment between host states and investors of foreign states. The ICSID convention touch base its jurisdiction from the treaties signed by the parties who provides consent for the arbitration as a resolution mechanism by ICSID. Several countries are signatories to the ICSID Convention. Many developing countries have also become the member and few have opted out of the Convention. India along with Brazil and South Africa has not signed the Convention. The paper seeks the reason why developing countries could not cope up with ICSID. It also focuses on the need for India to sign the convention in order to attract foreign direct investments for the economic development of the country. The paper also throws light on China's connection with ICSID for two decades. The researcher has relied on doctrinal research by using legislations as a primary source and the journals and articles as secondary sources.

Key Words: Investment Arbitration, ICSID, Developing Countries, Treaties, India.

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1. Introduction

International Centre for Settlement of Investment Disputes was established in 1966 and is an independent institution dedicated to resolve international investment dispute among investors and host state. It provides arbitration, conciliation or fact-finding as a settlement mechanism. While resolving the disputes ICSID takes care of the interests of host states and investors. Each party is provided equal opportunity to present their evidence and arguments. Expert assistance is provided through ICSID case team throughout process. ICSID through its dispute resolution process encourages and promotes international investment. The access to investment dispute settlement is available to member states. The daily operations of the ICSID are carried on by their secretariat like keeping list of member states, maintaining the panels of arbitrators and conciliators, maintaining documentation, publishing decision, order and awards on its website, etc. The official languages of ICSID are English, French and Spanish. Member State can designate up tofour persons to the panel of arbitrators and conciliators.

Investment Arbitration thrives upon an investment treaty, the national law of the host state, an independent investment agreement if entered into and the choice of independent and individual arbitrator or arbitral tribunal. The dispute resolution clause in treaties entrust power upon the arbitral tribunal to enquire about the behaviour of the host state towards foreign investors. The member of panels can be of any nationality. Bilateral or multilateral treaties are either governed by the terms of ICSID or the UNCITRAL Rules of Arbitration.

2. History And Evolution Of Icsid

ICSID was the outcome of the 10 years of debate in United Nations regarding relations between host state and investors state. World Bank could not satisfy the capital needs of the developing countries. During the decolonisation of Africa and Asia, the potential investors interested in foreign investment were seeking protection before risking their capital in a hostile environment. A stable dispute resolution mechanism over the subject matter of the agreement was needed for the world bank's mission of economic development.[2] Aron Broches, General-Counsel of World Bank, had been circulating the internal memoranda in writing in the Bank. By April 1962, Executive Directors proposed for the creation of a Centre for Settlement of Investment Disputes. It was suggested to solve the disputes by arbitration and conciliation through the centre, if the parties agreed to use the services of the Centre for arbitration and can avoid approaching Courts. The award would be

[2]Parra, Antonio R., 'The Development of the Regulation and Rules of the International Centre for Settlement of Investment Disputes', ICSID REVIEW-FOREIGN INVESTMENT LAW JOURNAL.

enforceable in the countries signing the Convention. The World Bank went ahead with the resolution in Tokyo to approve the Convention. The resolution was passed with 21 countries. The Convention in its Article 25 clarified the linking of dispute resolution of Bilateral Investment Treaty to ICSID if party's consent in writing to submit the disputes to Centre. The Convention was adopted in 1960 and was established in 1966.[3]

3.Developing Countries And ICSID

Investments are the major concern for developing countries. Be it investing in other country or welcoming investments from other country. Finance is the backbone of country's economies and for developing countries it becomes the matter of concern as they are always under the debts provided by world bank.Arbitration and conciliation under the ICSID Convention and Additional Facility Rules are voluntary. The parties provide consent to ICSID jurisdiction through theirconcluded investment laws, contracts, bilateral or multilateral treaties. Cases were instituted under the U.S-Columbia Trade Promotion Agreement, North American Free Trade Agreement, U.S.-Peru Trade Promotion Agreement.

As on 2020, there are 163 countries signatories and 155 countries are contracting states to the ICSID Convention. The increasing membership is an evident that ICSID is making its mark among the investors and considered as a chosen platform for the resolution of international investment disputes.The Republic of Djibouti is the newest Contracting State which has deposited its instrument of ratification with the World Bank on June 9, 2020. The first case was registered in 1972 and total of 303 cases were administered alone in the year 2020.Overall, 768 cases administered under ICSID Convention and Additional Facility Rules. Some of the signatories from the developing country to ICSID Convention are Bangladesh, Pakistan, Nepal, Singapore, Srilanka, Afganistan, Central African Republic, Mexico, Morocco, Qatar, United Arab Emirates, Uruguay, Ukraine, Zimbawbe.[4]

The ICSID Convention and the developing countries has not been connected smoothly. The actions of the government of developing countries carries a major impact in their own growth and development. The changing laws and the reviews of policy in developing countries is the reason for their detachment from the international investment regime like ICSID Convention. Developing countries like Bolivia, Ecuador and Venezuela have pulled out from ICSID Convention in 2007, 2010 and 2012 respectively. Ecuador terminated its BITs in 2008 when the agreements with Cuba,

[3]Nedumpara, James J. and Laddha Aditya. 'India Joining the ICSID: Is it a Valid Debate?', CTIL, Discussion Paper No. 1, November 2017.

[4] 2020 Annual Report, Excellence in Investment Dispute Resolution, ICSID.

the Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, Romania and Uruguay was terminated. The Constitutional Court of Ecuador in 2010 declared the arbitration provisions of Ecuador BITs with China, Finland, Germany, UK, Venezuela and USA to be inconsistent with the Constitution of Ecuador. Brazil is not the member of the ICSID Convention but has introduced its model Agreement on Cooperation and Facilitation of Investment (CFIA) in 2013 which includes ombudsmen as a term of its dispute prevention mechanisms. South Africa as well is not the member of ICSID Convention and has terminated many BITs in order to protect its public policy. Investor's protection provisions have been introduced into domestic law of investment.[5]

A well-known case of ***Salini Construttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco***[6], where Salini, an Italian company, requested arbitration, claiming that the company suffered damage since its contract for road construction with a private entity financed by the Moroccan government, was terminated. The Moroccan government objected to the jurisdiction of the arbitral tribunal, insisting that the claimant's contract for highway construction does not fall under the category of an investment as per the Italy-Morocco BIT nor an investment under the ICSID Convention. The arbitral tribunal held that the contract concerned falls under the category of an 'investment' as defined in the BIT, holding that the contract satisfies all of the elements of 'investment' in the ICSID Convention. Firstly, the tribunal affirmed the 'economic contribution', that the claimant had provided know-how, necessary equipment and capable personnel. Regarding the contract term, the tribunal held that the contract fulfilled the requirements of a minimum term of 2 to 5 years, because the duration was 32 months at the beginning and 36 months after the extension. With regard to risks, the tribunal stated that definite costs cannot be determined in advance for a long-term construction project, making it a clear risk for a contractor. Lastly, the tribunal affirmed the claimant's contribution to the economic development of the host country, based on the public interest and the know-how provided upon the construction.

For the arbitral tribunal based on the ICSID Convention to have jurisdiction, the right concerned must relate not only to an 'investment' as defined in the BIT but also 'investment' as used in the ICSID Convention. While determining whether it falls under the category of 'investment' under the ISCID Convention, (i) economic contribution, (ii) the period of time for which the contract was implemented, (iii) sharing of risks on the transaction, and (iv) contribution to the economic development of the host country are all taken into consideration.

[5] Mestral, de Armand. 'The Impact of Investor-State Arbitration on Developing Countries', CENTRE FOR INTERNATIONAL GOVERNANCE INNOVATION, November 2017.
[6] ICSID Case No. ARB/00/4.

Another case of ***TokiosTokelés v. Ukraine***[7]where a business enterprise TokiosTokelés, established under the laws of Lithuania, owned a publishing company in Ukraine. Ukrainian publishing company, published a book that portrayed a politician in the opposition party, due to which the owner TokiosTokelés was subjected to tax investigations by Ukrainian authorities which hindered its business activities and therefore, Ukraine breached the Ukraine-Lithuania BIT. On this breach TokiosTokelés filed for arbitration. The Ukrainian government claimed that because TokiosTokelés was 99% owned and controlled by Ukrainians, therefore, it did not fall under the definition of an investor who was protected under such BIT. The arbitral tribunal held that the nationality of a company is determined not based on the provisions of Article 25(2)(b) of the ICSID Convention but by the respective BIT. It rendered a decision that TokiosTokelés would be deemed to be a Lithuanian investor, as the BIT only defines an investor to be 'any entity established in conformity with the laws and regulations in the Republic of Lithuania'.

4. India And ICSID

India is one of the projecting developing countries that has abstained from joining the ICSID Convention, since its beginning. While India has not specified the specific explanations for its absence from the ICSID Convention, in 2000, the Indian Council for Arbitration recommended to the Indian Ministry of Finance that India refrain from becoming a signatory to the ICSID Convention on the following grounds: (1) the Convention's rules for arbitration supported towards the developed countries and (2) there is no choice for a review of the award by an Indian court even if it violates India's public policy.

India has terminated 58 Bilateral Investment Treaties on 31st March 2017. With the aim of increasing foreign investment flow into the country India has signed major BITs with US-India and Brazil-India. ICSID convention in 1965 created the forum for the resolution of disputes between investors and host state by introducing arbitration clause in contract between states. India has not signed the ICSID convention and has mitigated this non-membership by entering into BITs or Bilateral Investment Protection Agreements (BIPA) with many countries. In 1994, India signed its first BIT with United Kingdom. Such BITs or BIPA contains essential clauses of Applicability, Fair and Equitable Treatment (FET), Full Protection and Security, Most Favoured National Treatment (MFN), Expropriation, Dispute Resolution Regime.[8]

The first publicly known investment treaty decision against India was in ***White Industries***

[7]ICSID Case No. ARB/02/18.

[8]Sweta, Madhu and Tandon, Kanika. 'Investment Arbitration – The Assignation & Its Way Ahead in India', MONDAQ, August 2018.

Australia Limited v Republic of India[9] (White Industries). The Arbitration whose seat was fixed in Paris resulted in effecting the Republic of India with an award worth 4.06 Million Dollars in favour of White Industries.The White Industries ruling hastened a fundamental re-assessment of India's investment treaty framework and the review led India to adopt a new Model BIT in December 2015 (the Model BIT).The Model BIT mandates exhaustion of local remedies, negotiations and consultations before an investor initiate arbitration against host state. An investor can initiate the case in court of law within one year from the date of knowledge of loss in investment. The Model BIT of India provides room to negotiate BITs with different countries on different terms. It strikes a good balance between the interests of the host and investor state as well.The Belarus BIT of 2018 is based on the Model BIT of India.

The country has shown significant improvement in the Foreign Direct Investment in India. The developments with regard to foreign investment are the reasons India should consider joining ICSID. The other developed countries who are members to ICSID convention aims India as an investment hub. India as well has invested in countries like Netherlands, Singapore, Mauritius, USA and UK that are members to ICSID Convention. Therefore, membership to ICSID Convention would provide protection of rights to Indian investors and their investments in foreign countries.

Currently the investment awards are enforced through New York Convention which lacks certainty. Under Article 1(3) of the New York Convention India has availed commercial reservation which restricts its applicability to foreign awards arising out of legal relationships considered as commercial under Indian law. Hence, Arbitration and Conciliation Act, 1996 to be applied to Investor State Disputes Settlement is highly uncertain. It will not be fallacious to state that the New York Convention is not an expected command for the enforcement of investment awards in India. The predictable regime for the enforcement of investment award is provided by ICSID Convention. ICSID awards are final, directly enforceable and binding. It is undeniable that the ICSID Convention does not provide for a 'public policy review' of awards by the national courts but this aspect has been covered efficiently by the Model BIT of India.

Article 15.1 of the Model BIT of India provides a mandatory clause on 'exhaustion of local remedy' before invoking arbitration which means that when dispute arises, an investor must approach to domestic courts or administrative bodies of the host state in order to resolve it. Article 15.2 of the Model BIT provides a clarity that the investor must exhaust all judicial and administrative remedies for five years prior to arbitration. These provisions are in consonance with Article 26 of ICSID Convention, which permits Contracting States to exhaust local administration

[9]IIC 529 (2011).

or judicial remedies before providing consent to arbitration. Therefore, Article 15 of the Model BIT is another reason to join ICSID Convention which allows India's domestic judicial bodies to resolve the investment disputes prior to ICSID arbitration and in this way ICSID arbitration would restrict itself to institute unresolved disputes.

The most notable features of Model BIT of India are the absence of a traditional standard of treatment i.e. Most Favoured Nation provision, the replacement of the Fair and Equitable Treatment standard to a list of state obligations, and an explicit section on investor's obligations. It also includes provisions on Corporate Social Responsibility and compliance with the laws of the host state.

5. CHINA AND ICSID

The People's Republic of China (PRC) is not only the member to ICSID but also has been signatories of various BITs which grants binding mandatory jurisdiction to ICSID arbitration tribunals. The PRC consented to the ICSID Convention in 1993.In joining ICSID the PRC limited its scope of consent with regard to jurisdiction of ICSID. The PRC notified the Centre on January 1993 that 'pursuant to the Article 25(4) of the Convention, the Chinese Government would only consider submitting to the jurisdiction of the ICSID disputes over compensation resulting from expropriation and nationalization'.[10] This notification does not mean that PRC cannot broaden the jurisdiction of ICSID arbitration. The scope of jurisdiction on submitting claims before ICSID arbitration can be extended through PRC's BITs.

Under ICSID system, an investor-state arbitration can only be initiated if the host state has consented to the ICSID jurisdiction. Such consent arises through Bilateral Investment Treaties with another nation. After membership with ICSID Convention, PRC has signed hundreds of BITs providing consent to jurisdiction for ICSID arbitration. China is deeply engaged and intertwined with the ICSID system of investment protection and investor-state arbitration. Article 54 of the ICSID Convention specified that a member state must provide a domestic law enforcement mechanism for ICSID awards and that such mechanism must give awards the status of a 'final judgment of a court of that state' which requires china to ensure that ICSID awards may be enforced in the same manner as domestic court judgements.Article 238 of Civil Procedural Law of China clarifies that no other domestic law could override Article 54 of the ICSID Convention's requirements. However, in China a judicial interpretation from the Supreme People's Court is

[10]ISCID, Contracting States and Measures Taken by Them for the Purpose of the Convention (July 2020), https://icsid.worldbank.org/sites/default/files/2020_July_ICSID_8_ENG.pdf.

necessary to clarify lower court's authority to enforce awards.[11]

In the case of ***Beijing Urban Construction Group v Republic of Yemen[12]***, the arbitration under the contract entered in the year 2006 to build a $100 million international terminal for Yemen's main airport in Sana'a. The tribunal found that the language of the 2002 PRC-Yemen BIT was unsatisfying as between the narrow and broad interpretations. The tribunal considered the context of the language used and placed emphasis on the fork-in-the-road provision in the PRC-Yemen BIT, which requires an investor to choose between local court and ICSID protection, where the existence of expropriation would be determined in local courts, but losses to be quantified in arbitration.

In the last two decades since China gained the membership of ICSID, PRC faced extremely low arbitration brought by investor. On 24 May 2011, a Malaysian company filed the first-ever case against the Chinese government before ICSID, but that case was 'suspended' on 12 July 2011 pursuant to the party's agreement. The reason could be numerous but the modern China still has influence of the traditional Chinese culture which contributes to the amicable settlement of disputes. The Chinese environment are better suited and culturally prefers the means of non-litigation methods for resolving disputes such as consultation and mediation.[13]

6.COMPARISON BETWEEN ICSID AND UNCITRAL[14]

	ICSID Convention 1966 and ICSID Arbitration Rules 2006	**UNCITRAL Arbitration Rules 2013**
Nature of Rules	Rules are explicitly drafted for the investment disputes transported under the ICSID Convention.	In UNCITRAL model, investment arbitrations commonly adopt general commercial arbitration rules.
Applicability of Rules	**Article 25 of the Convention** - The ICSID jurisdiction extends to any dispute related to investment which arise between a Contracting State and a national of another Contracting State with the written consent of parties to submit to Centre.	**Article 1.4 -** Investment treaty for investor-state arbitration concluded after 1st April 2014, automatically applies UNCITRAL Rules.

[11]Ku, G. Julian. 'Enforcement of ICSID Awards in the People' s Republic of China', 6 CONTEMP. ASIA ARB. J. 31, 2013, https://scholarlycommons.law.hofstra.edu/faculty_scholarship/293/.

[12]ICSID Case No. ARB/14/30.

[13]Guiguo, Wang. 'Chinese Mechanisms for Resolving Investor-State Disputes', JINDAL JOURNAL OF INTERNATIONAL AFFAIRS, vol. 1, Issue 1, October 2011, https://jgu-dev.s3.ap-south-1.amazonaws.com/section-3-forth-file.pdf.

[14]Allen, Richard and SC, Leng Sun Chan. 'Comparative Chart of International Investment Arbitration Rules', BAKER MAKENZIE, January 2017, https://globalarbitrationnews.com/3168-2-20170112/.

Requirements of Arbitrators	**Rule 1(3) of Arbitration Rules** - Neither party may appoint a national of its own country as an arbitrator without the consent of the other party.	**Article 11 -** Arbitrators must reveal conditions that give rise to reasonable doubts about their impartiality or independence.
Appointment of Tribunal in the Event of a Defaulting Party	**Rule 4 -** If the parties did not consent on the appointment of tribunal within 90 days after registration of the case, either party may request to Chairman of the Administrative Council to make appointment.	**Article 9.2 -** The Claimant may request that the Secretary General of the Permanent Court of Arbitration (PCA) appoints an arbitrator on behalf of the Respondent if a Respondent fails to nominatewithin 30 days of the Claimant's nomination.
Grounds for Challenging Arbitrators	**Rule 9 (1)** - Tribunal can be challenged if arbitrator lacks competence in the fields of law, commerce, industry or finance in order to exercise independent judgement.	**Article 12.1 -** The ground for challenging the tribunal is when there are justifiable doubts as to the arbitrator's impartiality or independence.
Timing of Challenges to Arbitrators	**Rule 9** - Challenges need to be brought before the proceedings get closed. The validity of the challenge is determined by the members of the tribunal who are not challenged. Until decision is arrived on the challenge the proceeding remains suspended.	**Article 13 -** Challenge to the tribunal to be brought within 15 days of the notice of appointment. The validity of the challenge is determined by the Secretary General of the PCA.
Interim Measures	**Rule 39(1) -** After proceeding initiates party may request tribunal to recommend provisional measures for the preservation of rights.	**Article 26** - The tribunal may order interim measures only if the requesting party can satisfy that there can be irreparable harm if measures not issued and that there is reasonable possibility of his success on the merits of the claim.
Third Party Intervention	**Rule 37(2) -** After consulting both the parties, tribunal may allow third party with its interest, to file a written submission with regard to any matter in dispute to assist them in determining any legal or factual issue, if such submission brings different insights from that of disputing parties.	**Article 4 -** The tribunal in consultation with the parties may allow interested third parties in the proceedings to submit written *Amicus Curiae* to assist them in determining any legal or factual issue, if it brings different insights from that of disputing parties.

Applicable Law	**Article 42 -** The Tribunal decides the dispute on the rule of law agreed by the parties, failing which, the law of Contracting State party to the dispute, including ICSID rules and rules of international law is applied by the Tribunal.	**Article 35.1 -** Law designated by the parties are applied, failing which the Tribunal applies the law or rules of law as it deems fit to them.
Timing of Awards	**Rule 46** -Award to be signed within 120 days after closure of the proceedings which can be extended for further 60 days by tribunal if required.	UNCITRAL Rules is silent about such timing of awards.

7. Conclusion

Therefore, it can be concluded that ICSID protects the rights of investors and host countries while solving their disputes related to international investment. The mission of world bank is to promote economic development worldwide. Both developed and developing countries take part in the investment business and hence the world economic development plan requires the need for the protection of rights for the developing countries specifically. The changing laws of the developing countries are the reason for the incompatibility to cope up with investment regimes like ICSID. India is known as the investment hub and many developed countries seek to invest in India. The fact that ICSID does not protect the nation's public policy concern has very well mitigated by the India's Model BIT 2015 where the country has provided the condition that the public policy of India cannot be undermined in any case. India should reconsider to become member of ICSID convention because such developed countries who look towards investment in India are member with ICSID and India's joining ICSID will bring trust among the foreign investors that their host country is also connected to the same regime as they are.

Competition is for every country but it gets tougher for developing countries like India. Their survival at global level is like living on the edge. A small financial mistake can drastically affect the economic status of developing countries, whereas developed nations find it no difference as they are financially sound and effective. The international institutions are for every nation and it is important that they provide provisions which establishes trust and confidence of every nation specifically developed and under-developed countries. Hence, it is expected from ICSID to relax the rules only for developing countries by allowing the ICSID award to be reviewed by domestic courts and to provide concessions on the cost of arbitration proceedings explicitly for the developing countries. Such generosity is necessary in order to meet the World Bank's goal of economic development and to remove the line of difference between developed and developing

countries.

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