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SHOULD INDIA BECAME PARTY ON ICSID: IMPACT OF DEVELOPMENT OF INTERNATIONAL COMMERCIAL ARBITRATION IN INDIA

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ABSTRACT

India was asked to refrain from becoming a party to ICSID given to its lack of exposure to investment disputes. It was argued that ICSID is favorable to investors of developed countries and countries like India lacked power to review foreign investment awards under their domestic laws in case they breach India's public policy. India has come a long way since the 90s, today nearly every foreign country shows a strong interest in investing in India. Yet it is believed that India is unlikely to be a part of the International Centre for Settlement of Investment Disputes. This article gives a second look at the disinterest of India in joining ICSID. ICSID Convention is a very successful convention and it provides for an "institutional and legal structure for impartial conciliation committees and arbitral tribunals that are established in all instances to decide the matter at hand." Governments and the business community largely recognize and respect the ICSID Convention. All G-7 countries have ratified the ICSID Convention, with Canada joining for the first time in 2013. Along with other developing countries, El Salvador, Chile, Egypt, and others ratified the ICSID Convention. In order to provide a structured analysis of the issue at hand, the article examines the development of the ICSID Convention and India's stated position during several negotiating periods of the ICSID Agreement between 1961 and 1965.

Should India Became Party on ICSID: Impact of Development of International Commercial Arbitration in India

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Introduction

One of the most contentious issues in contemporary international investment law is investor-state dispute resolution (ISDS). Foreign investors may file claims before a panel of international arbitrators pertaining to issues of domestic administrative law, the execution of regulatory tasks, and even grounds of contractual disagreements with State enterprises. Recently, a number of nations have rejected or given the arbitration between investors and states a negative review. The intellectual or intellectual world has barely spared it either.

ISDS, though, won't go away at any moment soon. ISDS is inapplicable to nations that have cancelled bilateral investment treaties (BITs) as long as the expired agreements contain preservation clauses. Furthermore, additional investment treaties are signed as a result of BIT talks or as essential parts of all-encompassing investment and commerce accords. In other words, a complete withdrawal from ISDS is improbable or at best improbable.

Which type of investment dispute resolution mechanism could be better suitable for developing nations like India because have been experiencing a rising flood of arbitral proceedings against these countries over the past several years becomes a moot issue supposing that ISDS will continue to be significant. The ISDS is condemned for being expensive, biassed in favour of investors, and lacking an appeals process.[1]

if somebody decides to believe the extreme statements about the drawbacks and risks of ISDS, it would still be imperative to have an equitable and impartial resolution of disputes as long as investor claims are being put out for review. The matter about if India should change its mind about ratifying the ICSID Convention is raised by the fact that ICSID is one of the top hubs for worldwide investment disputes.[2]

[1] See Holiday Inns S.A. and others v. Morocco, ICSID Case No. ARB/72/1, Decision on Jurisdiction (May 12, 1974); P. Lalive, The First 'World Bank' Arbitration – Some Legal Problems, 51 BRITISH YEARBOOK INT'L. L. 123, 130 (1980)
[2] See ICSID, THE ICSID CASELOAD- STATISTICS (ISSUE 2017-1) 9 (2017)

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The ICSID Convention is widely accepted and respected by governments and the corporate sector. The ICSID Convention has been ratified by all G-7 nations, with Canada becoming a member for the first time in 2013. El Salvador, Chile, Egypt, and other developing nations additionally ratified the ICSID Convention. The essay follows the history of the ICSID Convention and India's declared stance across multiple negotiation phases of the ICSID Agreement during 1961 and 1965 so as to give a planned examination of this query.

Overview of the ICSID Convention and its Criticism

The International Bank for Reconstruction and Development (IBRD or the World Bank) oversaw the creation of the Convention on ICSID which was made public for signing and approval on March 18, 1965. ICSID became operational on October 14, 1966. 153 nations had signed and ratified the Convention as of October 2017. The ICSID Convention provides a "institutional and legal structure for impartial conciliation committees and arbitral tribunals that are established in all instances to decide the matter at hand."

The ICSID Centre for Dispute Resolution was created by the ICSID Convention to carry out this helpful duty. The ICSID Further Facility was established on September 27, 1978, in lieu of the ICSID Convention, to provide arbitration, conciliation, and fact-finding services for some disputes that do not fall under the purview of the ICSID Convention and in which neither the State party to the dispute nor their state of residence of the citizen of another nation engaged is one of the Contracting States of the Convention.

The ICSID Additional Facility is controlled by other rules, not the ICSID Convention, and awards made under the ICSID Additional Facility are not governed by the subject to broad guidelines like the norm of immediate execution of ICSID awards. Initial reactions to the establishment of ICSID were not very positive. The first action that was taken before the ICSID was an arbitration against Morocco in 1972 over challenges to the regular operation of hotels constructed by certain American investors.[3]

[3] Gus Van Harten, supra note 10; Uma Kollamparambil, supra note 12

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However, it wasn't until the 1980s and 1990s that ICSID began to draw cases. In accordance with the ICSID Convention including the Additional Facility Rules, 597 applications had been recorded as of December 31, 2016, by the ICSID. As the ICSID's backlog has grown over the past few years, additionally evolved the criticism that the organisation isn't serving the objectives of poor nations. The majority of cases filed by the ICSID involve nations in Latin America. The majority of the cases involving ICSID concerned claims resulting from legislative actions impacting public interests, such as water and wastewater services.

The nations of South and Central America have taken unprecedented and dramatic measures as a result of these changes, including reviewing the conventional paradigm for agreements regarding investment. The argument put out by developing nations is that agreements result in an unfair allocation of rights and duties between both industrialised and developing countries. These accords raise the possibility of prosecution and enormous financial losses, which might quickly cancel out whatever apparent advantages in terms of increased investment flows.[4]

It goes without saying that the costs of lawsuits and damages granted in investor-State conflicts can be prohibitive for the majority of nations that develop. Recently, a number of developing nations have left the ICSID Convention. Bolivia withdrew from the ICSID Convention on May 2, 2007, by delivering a notice of condemnation. On the other side, Ecuador initially used Article 25(4) of the ICSID Convention to limit ICSID's purview over disputes involving transactions in energy resources, especially oil, gas, minerals, along with additional types.

Ecuador then added a notice of denunciation with effect from January 7, 2010, on July 6, 2009. On January 24, 2012, the Bolivarian Republic of Venezuela also announced that it will be resigning from the Agreement on ICSID after the departure of Bolivia and Ecuador from ICSID. In light of Argentina's experience, Nicaragua's Attorney General stated on April 14, 2008 that Nicaragua intended to oppose the ICSID Convention and further stated that Nicaragua was not going to sign agreements regarding investment where ICSID has been designated.

[4] M. H. Mourra, The Conflicts and Controversies in Latin American Treaty-Based Disputes, in LATIN AMERICAN INVESTMENT TREATY ARBITRATION 60

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What is wrong with ICSID?

Is ICSID being unfairly held responsible for some Member States' policy instability and incompetence? This issue is still up for debate. Some developing nations' main worry is that the ICSID was "established by, and arguably in the interest of, wealthy countries and their investors abroad." When openly denouncing the ICSID in 2009, Senator Raphael Correa of Ecuador said that it was important for "the emancipation of the nations we represent because this [ICSID] signifies colonialism, servitude with respect to multinational companies and... the World Bank and we is unable to tolerate this [sic]". The pro-investor bias of ICSID, the inconsistency of the ICSID Convention with the Venezuelan Constitution, and the restrictions placed on the nation's sovereign rights, as to the Venezuelan government, were the main causes of its withdrawal from the Convention on International Criminal Court [5]

Some of the broad criticisms against ICSID's structure and operations are the following:

a) ICSID's relationship with the World Bank;

b) A lack of transparency of the ICSID's proceedings;

c) Arbitrator bias in favour of investors

d) Cost of litigation;

e) The absence of an appeal process, but only a limited annulment procedure

ICSID's relationship with the World Bank

It is suggested that the ICSID's complex connection with the World Bank endangers its ability to perform its duties. Understanding ICSID's organisational structure is essential to understanding the criticism of the organization's link to the World Bank. There is an Administrative Council and a Secretariat for ICSID. A Secretary-General, one or more Deputy Generals, and other professional and administrative employees make up the Secretariat. The Administrative Council chooses the Secretary-General and Deputy Secretary-General.

Arbitrators can be chosen by the ICSID Secretary-General to settle investment disputes. The Administrative Council, which oversees ICSID, is chaired by the World Bank Governor by virtue of office. The World Bank and its Fund hold their annual meetings concurrently with the ICSID

[5] Fiezzoni, supra note 11, 137 (As of November 14, 2017, Nicaragua is a contracting State of the ICSID Convention.)

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Administrative Council's annual conference. The World Bank also provides funding for the ICSID Secretariat. Despite the fact that ICSID is associated with the World Bank, there is no systematic pattern or occurrence that would support a finding that ICSID's independence or judicial character are in jeopardy. [6]

Contrary to other investment arbitration institutions, ICSID's Contracting States have more readily available and less expensive access to technical and financial resources. Despite the obvious connections between ICSID and the World Bank, it should be underlined that this critique seems more polemical than it is supported by facts. To prove beyond a reasonable doubt that ICSID's relationship with the World Bank compromises its judicial independence, more evidence is necessary.

Inadequate transparency

The ICSID is frequently accused of lacking openness in its processes. In light of current events, this critique has to be re-examined. The ICSID Arbitration rules did not have clauses to guarantee openness in the procedures before to 2006. Parties are permitted to attend or watch all or a portion of the proceedings in accordance with the new rules announced on April 10, 2006. The ICSID arbitral courts have some latitude under Rule 37 of the ICSID Arbitration Rules to accept arguments from other parties. Additionally, the ICSID will only publicize the delivered award with the parties' permission. In any circumstances, it must disclose the legal analysis of the award in extract form.[7]

The same regulations apply to conciliation processes. It should be highlighted that parties have the freedom to control the procedures due to the public-private structure of ICSID awards. In stark contrast, hearings in UNCITRAL procedures are held behind closed doors unless the parties agree to a different arrangement. An award will only be made public with the agreement of all parties, or "where and to the extent disclosure is required of a party by legal duty, to protect or pursue a

[6] Leon E. Trakman, The ICSID Under Siege, 45 CORNELL INT'L L.J. 603, 666 (2013) [hereinafter "Trakman"]; Sergey Ripinsky, Venezuela's Withdrawal From ICSID: What it Does and Does Not Achieve (Apr. 13, 2012),
[7] Fernando Aguirre, Bolivia in LATIN AMERICAN INVESTMENT PROTECTION 65 (Jonathan C. Hamilton eds., 2012).

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legal right, or in relation to legal proceedings before a court or other competent authority," as stated in Article 34(5) of the UNCITRAL Arbitration Rules. However, UNCITRAL does not accept proposals from outside parties.

To adequately clarify the transparency question, it is important to discuss recent developments in UNCITRAL and other investor-state dispute systems. The UNCITRAL Transparency Rules, sometimes known as the "UNCITRAL Transparency Rules," were published in 2013. The UNCITRAL Transparency Rules provide that tribunals may receive arguments from third parties, hearings must be open to the public, and all significant documents in the procedures must be made public

Cost of Litigation

The expense associated with international investment arbitration is a prominent complaint. The ICSID processes are reportedly quite expensive and complicated. The United Nations Conference on Trade and Development (UNCTAD) asserts that the price of investor-State arbitrations has "skyrocketed" recently. An ISDS case's litigation expenses have often exceeded USD $8 million, although they have occasionally gone above USD $30 million. The consequences of this are especially severe for emerging nations.

According to detractors, poor nations lack the financial capacity to cover the legal bills and other associated costs of defending themselves against well-established investors. These expenditures also cover the fees paid to legal firms, experts, and witnesses needed throughout the procedures, in addition to the fees and expenses paid to ICSID and the three arbitrators while the dispute was pending. Studies on international investor-State arbitration show that UNCITRAL arbitration is more expensive with an average than ICSID arbitrations. [8]

According to ICSID, it seeks to adopt a price system that is both affordable and effective, with Secretariat fees as low as $42000 year (paid exclusively by contracting States) and an arbitration

[8] See Corporate Europe Observatory & the Transnational Institute, PROFITING FROM INJUSTICE HOW LAW FIRMS, ARBITRATORS AND FINANCIERS ARE FUELLING AN INVESTMENT ARBITRATION BOOM (Nov. 2012)

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fee ceiling of $3000 per day. Additionally, the ICSID arbitration hearings typically last between 3 and 3.6 years. Parties in UNCITRAL have the option of appealing the tribunal's costs to the person who appointed the tribunal. The tribunal must abide by any adjustments made to fees and costs made by the appointing body. Additionally, it is anticipated that the attorneys and law firms engaged in the case would get a substantial portion of the legal fees expended by the parties in investment arbitrations.

Annulment Mechanism

The ICSID renders binding decisions that are not appealable and are only subject to the remedies listed in the ICSID. Revision and annulment are the options offered as remedies. A party may also ask ICSID whether it failed to respond to any questions it received. A party may also ask for the award to be interpreted. A three-arbitrator ad hoc body is formed in response to the annulment request. Any annulment must be solely based on one or more of the five reasons listed in Article 52 (1) of the ICSID Convention. An ad hoc committee may only annul a tribunal's verdict in whole or in part or leave the award untouched.

An ad hoc committee, unlike an appellate body, cannot examine an award for errors of fact; although misapplying the applicable law is not susceptible to annulment procedures, utterly failing to apply the applicable law is. It is not permitted to alter an award, substitute its own judgement for it, or send it back to the tribunal for reconsideration. The ICSID Convention's travaux préparatoires (negotiation history) reveal that its drafters took a conscious decision not to broaden the grounds for annulment to include "violation or unwarranted interpretation of principles of substantive law." An ad hoc committee "can destroy a res judicata but cannot create a new one," claims Christopher Schreuer.

Arbitrator Bias

The majority of arbitrators in investment arbitration, including that of the ICSID, are criticised for having backgrounds in investments, which they say leads to biases that benefit investors. 47% of the Arbitrators, Conciliators, and Ad hoc Committee Members appointed in ICSID cases come from Western Europe, according to the 2017 ICSID Caseload Statistics. Arbitrators have the

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reputation of being biased "private judges" in favour of investors. The president of Bolivia asserted that Latin American developing nations "never win the cases. The multinationals always prevail.[9] However, there is a sizable body of contradictory research analysing allegations of investor prejudice in investment treaty arbitration. It is crucial to note that allegations of investor prejudice in ICSID procedures made by a small number of developing nations do not reveal a general bias in judgements or proceedings against developing nations. It is accurate to say that the arbitral losses suffered by a small number of developing countries in the investor-State dispute before the ICSID do not result in a net loss for the whole group of developing countries.

Therefore, it is impossible to fully rely on any assertion regarding the existence of arbitrator prejudice. The essay will next explore whether the ICSID Convention can satisfy India's concerns surrounding investment treaty arbitration and dissuade it from signing and ratifying the ICSID Convention once it has addressed the broad criticism levelled against ICSID.

India and Investor-State Arbitration

The following section of the paper will begin with a brief introduction of India's experience with investment arbitration in order to serve this aim. The explanation of India's position on investor-State arbitration and its suggestions made during the creation of the ICSID Convention comes next. The study will then examine whether the ICSID can accept India's investor-State arbitration strategy.

Since entering into its first bilateral investment treaty (BIT) with the United Kingdom (UK) in 1994, India has taken a variety of steps to encourage foreign investment. From 1994 to 2000, India entered into BITs with nearly all major European nations, including France, Germany, Italy, Netherlands, Belgium, Denmark, Poland, Switzerland, and Sweden. From 2000 onward, India entered into BITs with many developing nations.[10]

[9] 6 Babiy, Larisa et. al., Should Mexico Join the ICSID? THE GRADUATE INSTITUTE, GENEVA, CENTRE FOR TRADE AND ECONOMIC INTEGRATION 6 (2012).
[10] ICSID, Rules of procedure for Arbitration proceedings, rule 37 in ICSID CONVAENTION, REGULATIONS AND RULES

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Conclusion

It is not surprising that investment arbitration has increased somewhat in frequency in the context of international dispute resolution as a result of the opening up of global markets and the development of fresh procedures to promote the flow of investment. Several nations' reneging on their promise to investment treaties has made it more problematic at the same time. This article has claimed that while the ICSID Convention has certain drawbacks in terms of transparency, litigation expense, and arbitral bias, it also offers some compensating advantages. There is a ton of research that shows how well ICSID stacks up versus other rival forums like UNCITRAL, especially when it comes to things like arbitral bias and litigation expenses. There is a converging opinion across numerous forums to provide better openness in this area.

The concern is whether India's interests may be harmed by joining ICSID in particular. The judicial thinking inside the ICSID on a number of conceptual and definitional concerns has been taken into consideration in India's 2015 Model BIT. It is reasonable to say that India's new 2015 Model BIT is made to prevent the difficulties that may result from any liberal application of the ICSID doctrines and jurisprudential ideas. For instance, India's approach to these concerns in its 2015 Model BIT is consistent with some provisions of the ICSID Convention pertaining to the exhaustion of local remedies, the concept of "investment," and the "applicable law."

The execution of arbitral judgements made under international investment treaties, however, would be a tricky problem. India would like to maintain some latitude in challenging the enforcement of such judgements to the extent that such principles clash with local arbitration legislation in India. India's domestic courts continue to have a lot of authority when deciding whether or not foreign arbitral judgements may be enforced there.

The impact of this element on India's decision to join the ICSID is debatable, but it would be important for India to consider whether domestic courts will really interfere with the decisions of international investment tribunals. Given India's greater goal of becoming a centre for investment, it is essential for India to choose and put into practice a consistent strategy for investment arbitration and maybe take a second look at ICSID.

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The UNCTRAL Arbitration Rules do not provide machinery for enforcement of awards and art. 40 of the UNCITRAL Arbitration Rules merely declares that the award shall be final and binding. 111

History of the ICSID, supra note 75, 527. 112 The Hindu's Bureau, ICA Against India Joining Global Dispute Settlement Body THE HINDU BUSINESS LINE