DISCUSSION PAPER

INDIA JOINING THE ICSID: IS IT A VALID DEBATE?

James J. Nedumpara and Aditya Laddha

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INDIA JOINING THE ICSID: IS IT A VALID DEBATE?

James J. Nedumpara and Aditya Laddha*

Abstract

The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) is a widely accepted and recognised forum for international investment dispute settlement. All G-7 countries and even India's neighbours such as Pakistan, Bangladesh, China, Sri Lanka and Nepal have signed and ratified this Convention. With India becoming one of the active parties in international investment arbitration in recent times, the natural question to pose is whether India should become a contracting party to the ICSID Convention or not. This article examines some of the widely raised criticisms against the ICSID Convention and enquires whether India should revisit its position on joining the ICSID Convention. While examining this issue, the article traces India's stated positions in the negotiating stages of the ICSID Convention and the development of the ICSID case laws and practices over the last four decades. The article concludes that fifty years is a substantial passage of time for any country to reformulate its position on an international treaty especially when other credible alternative forums for investment dispute resolution have not come up.

I. Introduction

Investor- State dispute settlement (ISDS) is one of most controversial topics in international investment law in recent times. Foreign investors are able to bring claims relating to questions of domestic administrative law, exercise of regulatory functions and even matters of contractual claims with State entities before a panel of international arbitrators.

Of late, Investor- State arbitration has been rejected or unfavourably looked at by several countries. It has hardly been spared by the academic and scholarly community either. However, ISDS is not going to disappear anytime soon. Even for countries that have terminated their bilateral investment treaties (BITs), there is no escape from ISDS so long as the terminated treaties have survival clauses. In addition, fresh investment treaties are also concluded as part of BIT negotiations or as integral components of comprehensive trade and investment agreements. In short a full retreat from ISDS is nearly impossible or at most a remote possibility.

Assuming that ISDS will have continuing significance, it is a moot question as to which investment dispute resolution forum could be more appropriate for developing countries such as India that have been facing a rising tide of arbitral cases against them in past few years. The ISDS is being criticised primarily for being costly, for its pro-investor bias and for the lack of an appeal mechanism. Even if one were to accept the sensationalist claims about the pitfalls and dangers of ISDS, an unbiased and impartial dispute resolution mechanism is absolutely necessary so long as investment claims are submitted for adjudication.

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*James J. Nedumpara is Head and Professor, Centre for Trade and Investment Law, Indian Institute of Foreign Trade, New Delhi. Email:headctil@iift.edu; Aditya Laddha is a Research Fellow, Centre for Trade and Investment Law, Indian Institute of Foreign Trade, New Delhi. The authors thank Professor Leila Choukroune and Archana Subramanian for their insightful comments and suggestions. The opinion expressed in this paper are the authors' own and do not reflect the position of their organization.

The existence of ICSID as one of the leading centres of international investment arbitration presents the question whether India should reconsider its position on joining the ICSID Convention or not. [1] The ICSID Convention commands widespread acceptance and recognition among the nations and business community. All G-7 countries have joined the ICSID Convention, with Canada being the latest entrant in 2013. Several developing countries such as Chile, Egypt and El Salvador have also joined the ICSID Convention.

In order to provide a structured analysis of this question, the article traces the history of the ICSID Convention and India's stated position at various negotiating stages of the ICSID Convention between 1961 and 1965. The article also juxtaposes the ICSID dispute settlement jurisprudence on several seminal issues of investment law with India's revisionist position on BITs outlined in the 2015 Model BIT. By comparing and contrasting India's revised position on investment treaties with the ICSID framework, the article proposes a path which India might consider in re-evaluating its position on ICSID.

II. Overview of the ICSID Convention and its criticism

The ICSID Convention was formulated under the aegis of the International Bank for Reconstruction and Development (IBRD or the World Bank) and was opened for signature and ratification on March 18, 1965.[2] The ICSID entered into force on October 14, 1966. As of October, 2017, 153 countries have signed and ratified the Convention.[3] The ICSID Convention offers an "institutional and procedural framework for independent conciliation commissions and arbitral tribunals constituted, in each case, to resolve the dispute".[4] In order to accomplish this facilitative function, the ICSID Convention has established the ICSID Centre for dispute resolution.[5] Apart from the ICSID Convention, the ICSID Additional Facility was created on September 27, 1978 which offers arbitration, conciliation, and fact-finding services for certain disputes that fall outside the scope of the ICSID Convention and where either the State party to the dispute or the home State of the foreign national involved is not a Contracting State of the Convention[6]. The ICSID Additional Facility is governed by separate rules and not the ICSID Convention; in addition the general provisions such as the rule of automatic enforcement of ICSID awards are not applicable to the awards rendered under the ICSID Additional Facility.[7]

The response in the initial years to the setting up of ICSID was not very encouraging. The first case that was brought to the ICSID was in 1972, an arbitration against Morocco related to the hindrances in the performance of day-to-day operations of hotels built by certain American

[1] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter "ICSID Convention"].

[2] 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 ¶3 Doc. ICSID/15 (Mar. 18, 1965) [hereinafter "Report of the Executive Directors"].

[3] *See* Database of ICSID Member States, (https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx) (last visited Nov. 14, 2017).

[4] Parra, Antonio R., *The Convention and Centre for Settlement of Investment Disputes (Volume 374)* 324, in COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW, The Hague Academy of International Law (2015) [hereinafter "Antonio Parra"].

[5] ICSID, *supra note* 1, art. 1.

[6] *See* Administrative Council Resolution AC (12)/RES/38, *Creation of an Additional Facility*, ICSID Thirteenth Ann. Rep. 1978/1979, 33 (Sept. 27, 1978).

[7] ICSID Additional Facility Rules, Schedule C – Arbitration (Additional Facility) Rules, art. 3, ICSID/11 (Apr. 2006), (https://icsid.worldbank.org/en/Documents/icsiddocs/AFR_English-final.pdf) (last visited Nov. 14, 2017) [hereinafter "ICSID Arbitration (Additional Facility)"].

investors.[8] However, ICSID started attracting cases in the 1980s and 1990s. As of December 31, 2016, the ICSID had registered 597 cases under the ICSID Convention and the Additional Facility Rules.[9] The case load of the ICSID has been increasing over the years, so too the refrain that ICSID is not advancing the interests of developing countries.[10]

A considerable proportion of the total ICSID caseload is against Latin American countries.[11] Most of the disputes before ICSID involved claims that have arisen from regulatory measures affecting matters of public interest such as water and sewage services. These developments have led the South and Central American countries taking unparalleled and drastic decisions to review the traditional model of investment treaties. Developing countries have argued that the treaties create an unequal distribution of rights and obligations between developed countries and developing countries.[12] These treaties lead to a higher risk of litigation and staggering monetary damages which could easily wipe out any perceived benefits in terms of higher investment flows.[13] Needless to add, the litigation costs and damages awarded in investor-State disputes can be overwhelming for most developing countries.[14]

Of late, several developing countries have withdrawn from the ICSID Convention. On May 2, 2007 Bolivia pulled out from the ICSID Convention by submitting the notice of denunciation.[15] Ecuador on the other hand, first restricted ICSID's jurisdiction in disputes arising from natural resources investments, including oil, gas, mineral and others by resorting to Article 25(4) of the ICSID Convention.[16] Subsequently, on July 6, 2009, Ecuador also submitted a notice of denunciation with effect from January 7, 2010.[17]

After the withdrawal of Bolivia and Ecuador from ICSID, on January 24, 2012 the Bolivarian Republic of Venezuela similarly declared that it would also be withdrawing from the ICSID Convention.[18] On April 14, 2008 Nicaragua's Attorney General expressed Nicaragua's intention to denounce the ICSID Convention, based on Argentina's experience and indicated that Nicaragua would not sign investment agreements where ICSID has been designated as the

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[8] *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)

[9] *See* ICSID, THE ICSID CASELOAD- STATISTICS (ISSUE 2017-1) 9 (2017), (https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202017-1%20(English)%20Final.pdf) (last visited Nov. 14, 2017).

[10] Van Harten, Gus, *Five Justifications for Investment Treaties. A Critical Discussion*, 2 TRADE L. & DEV. 19, 25 (2010) [hereinafter "Gus Van Harten"].

[11] Silvia Karina Fiezzoni, *The Challenge of UNASUR Member Countries to Replace ICSID Arbitration*, 2 BEIJING L. REV. 134, 134 (2011) [hereinafter "Fiezzoni"]; (As per the ICSID Caseload Statistics 2017, around 30% of the total ICSID cases have been against Latin American countries).

[12] Uma Kollamparambil, *Why developing countries are dumping investment treaties?* (Apr., 2016), (https://www.wits.ac.za/news/latest-news/in-their-own-words/2016/2016-03/why-developing-countries-are-dumping-investment-treaties.html) (last visited Nov. 14, 2017) [hereinafter "Uma Kollamparambil"].

[13] Gus Van Harten, *supra note* 10; Uma Kollamparambil, *supra note* 12.

[14] *Ibid.*

[15] ICSID, List of Contracting States and Other Signatories of the Convention, (http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actional=ShowDocument&language =English) (last visited Nov. 14, 2017); ICSID, *supra note* 1, art. 71.

[16] *See* Ecuador's Notification under Article 25(4) of the ICSID Convention, (http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actioVal=ViewAnnouncePDF&AnnouncementType=regular&AnnounceNo=9.pdf).

[17] *See* Ecuador- Executive Decree 1823/2009, art. 1, (https://minka.presidencia.gob.ec/portal/usuarios_externos.jsf) (last visited Nov. 14, 2017).

[18] M. H. Mourra, *The Conflicts and Controversies in Latin American Treaty-Based Disputes, in* LATIN AMERICAN INVESTMENT TREATY ARBITRATION 60 (M. H. Mourra eds., 2008) [hereinafter "Mourra"].

body for dispute resolution.[19]

1. What is wrong with ICSID?

Is ICSID a whipping boy, falsely blamed for the incompetence and unstable policies of some Member States? The jury still out on this question. The primary concern of a number of developing countries is that the ICSID was "established by, and arguably in the interest of, wealthy countries and their investors abroad."[20] President Raphael Correa of Ecuador while publicly condemning the ICSID in 2009 remarked that denunciation was necessary for "the liberation of our countries because this [ICSID] signifies colonialism, slavery with respect to transnationals and … the World Bank and we cannot tolerate this [sic]".[21] According to the Venezuelan government, the major reasons for it to withdraw from the ICSID Convention were ICSID's pro-investor bias, the incompatibility of the ICSID Convention with the Venezuelan Constitution and the limitations imposed on the country's national sovereignty.[22]

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

a) ICSID's relationship with the World Bank[23];
b) A lack of transparency of the ICSID's proceedings[24];
c) Arbitrator bias in favour of investors[25];
d) Cost of litigation[26];
e) The absence of an appeal process, but only a limited annulment procedure[27].

We will analyse some of these criticisms in greater details. A full-fledged enquiry of these criticisms will entail a more organized study; however, we think that some of the conclusions that we draw from our article could be starting point for a more detailed and structured analysis of this issue.

[19] Fiezzoni, *supra note* 11, 137 (As of November 14, 2017, Nicaragua is a contracting State of the ICSID Convention.)
[20] 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), (https://www.iisd.org/itn/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve) (last visited Nov. 14, 2017).
[21] Fernando Carbrera Diaz, *Ecuador continues exit from ICSID, Investment Treaty News* (Jun. 8, 2009), (https://www.iisd.org/itn/2009/06/05/ecuador-continues-exit-from-icsid/) (last visited Nov. 14, 2017).
[22] The Ministry of Foreign Affairs of Venezuela issued an official press release on January 25, 2012 wherein it was mentioned that ICSID had ruled in favour of transnational interests 232 times in the 234 cases it has taken on throughout its history.
[23] Fiezzoni, *supra note* 11, 135.
[24] Fernando Aguirre, *Bolivia* in LATIN AMERICAN INVESTMENT PROTECTION 65 (Jonathan C. Hamilton eds., 2012).
[25] *Ibid*.
[26] *See* Corporate Europe Observatory & the Transnational Institute, PROFITING FROM INJUSTICE HOW LAW FIRMS, ARBITRATORS AND FINANCIERS ARE FUELLING AN INVESTMENT ARBITRATION BOOM (Nov. 2012) [hereinafter "Profiting from Injustice"].
[27] Mourra, *supra note* 18, 42.

a. ICSID's relationship with the World Bank

It is argued that the ICSID's intricate relationship with the World Bank jeopardizes the judicial function of ICSID.[28] In order to appreciate the criticism concerning the relationship between ICSID and the World Bank, it is imperative to understand the organizational structure of ICSID. The ICSID has a Secretariat and an Administrative Council.[29] The Secretariat consists of a Secretary-General, one or more Deputy General and other professional and administrative staff.[30] The Secretary-General and Deputy Secretary General are elected by the Administrative Council.[31] The Secretary General of ICSID has the authority to appoint arbitrators to resolve investment disputes.[32]

The Governor of the World Bank is an *ex officio* Chairman of ICSID's governing body, the Administrative Council.[33] The annual meeting of the World Bank and its Fund coincides with the annual meeting of the Administrative Council of ICSID.[34] Moreover, the World Bank funds the ICSID Secretariat.[35] Although, ICSID is linked to the World Bank there exists no systematic pattern or events to make a conclusive claim that ICSID's judicial nature or autonomy is compromised. In fact, on a positive side, greater technical and financial resources are available to ICSID's Contracting States at greater ease and at lower cost when compared to other investment arbitration institutions.[36]

Although there are unmistakeable ties between ICSID and the World Bank, it is to be noted that this criticism sounds more polemic rather than evidence based. More evidence is required to conclusively establish that ICSID's judicial autonomy is being compromised because of its affiliation with the World Bank.

b. Lack of transparency

It is often alleged that the ICSID has shown a lack of transparency in proceedings.[37] This criticism needs to be reassessed in the light of recent developments. Prior to 2006, the ICSID Arbitration rules did not contain provisions to ensure transparency in the proceedings. According to the new rules adopted on April 10, 2006, parties are allowed to attend or observe all or part of the hearings.[38] Rule 37 of the ICSID Arbitration Rules provides ICSID arbitral

[28] Andres Arauz G., *Ecuador's Experience with International Investment Arbitration* in INVESTMENT TREATIES: VIEWS AND EXPERIENCE FROM DEVELOPING COUNTRIES 149 (Kinda Mohamadieh eds. 2015); Katia Gomez, *Latin America and ICSID: David vs. Goliath*, 17 L. & BUS. REV. AM. 195 (2011).
[29] ICSID, *supra note* 1, art. 3.
[30] *Ibid.*, art. 9.
[31] ICSID, *supra note* 1, art.10.
[32] *See* Investment Arb. Rep., *Co-Arbitrators in Mining Dispute Rule that ICSID Acted Within its Authority When It Nominated an Arbitrator After Gambia Failed to Do So Within Prescribed Time Limit* (May 20, 2011), (http://www.iareporter.com/articles/20110520_1) (last visited Nov. 14, 2017).
[33] *See* Organizational Structure of ICSID, (http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=RightFrame&FromPage=Organization%20and%20Structure&pageName=Organization) (last visited Nov. 14, 2017).
[34] *Ibid*.
[35] *Ibid*.
[36] Babiy, Larisa *et. al., Should Mexico Join the ICSID?* THE GRADUATE INSTITUTE, GENEVA, CENTRE FOR TRADE AND ECONOMIC INTEGRATION 6 (2012).
[37] Mourra, *supra note* 18, 30.
[38] ICSID, Rules of procedure for Arbitration proceedings, rule 37 in ICSID CONVENTION, REGULATIONS AND RULES (Apr. 2006) ICSID/15, (https://icsid.worldbank.org/en/Documents/resources/2006%20CRR_English-final.pdf) (last visited Nov. 14, 2017) [hereinafter "ICSID Arbitration Rules"].

tribunals with some discretion to admit third-party submissions.[39] Furthermore, the ICSID will publish the award rendered only if the parties have given their consent.[40] In any case, it has to publish the excerpts of the legal reasoning of the award.[41] Similar rules exist for conciliation proceedings.[42] It is to be noted that in view of the public-private nature of the ICSID awards, parties are given discretion to regulate the proceedings.[43]

In comparison and in major contrast, in UNCITRAL proceedings, hearings are conducted *in camera* unless the parties otherwise agree.[44] According to Article 34(5) of the UNCITRAL Arbitration Rules, an award will be made public only with the consent of all parties or "where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority".[45] The UNCITRAL, however, does not permit third party submissions.[46] It is necessary to mention the recent developments in UNCITRAL and and other investor-State disputes regimes to explain the transparency topic.

In 2013, UNCITRAL issued its Rules on Transparency in Treaty-based Investor–State Arbitration [UNCITRAL Transparency Rules].[47] As per the UNCITRAL Transparency Rules, all the main documents in the proceedings are required to be made public[48], tribunals are permitted to accept third party submissions[49] and hearings should be in public[50].

Furthermore, on October 18, 2017, the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, also known as Mauritius Convention, entered into force[51]. The Mauritius Convention gives force to the application of the UNCITRAL Transparency Rules to UNCITRAL investor-State arbitration proceedings.[52] It also states that the UNCITRAL Transparency Rules are applicable to non-UNCITRAL investor-State arbitrations (such as ICSID arbitrations) parties initiated under pre-April 1, 2014 investment treaties provided it is not objected by the State or the claimant involved in the dispute.[53]

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[39] *See* Suez v. Argentine Republic, ICSID Case No. ARB/03/19, 21 ICSID Rev. 342 (2006).
[40] ICSID, *supra note* 1, art. 48.
[41] ICSID Arbitration Rules, *supra note* 38, rule 48(4).
[42] ICSID, Rules of procedure for Conciliation proceedings, rule 33 in ICSID CONVENTION, REGULATIONS AND RULES (Apr. 2006) ICSID/15, (https://icsid.worldbank.org/en/Documents/resources/2006%20CRR_English-final.pdf) (last visited Nov. 14, 2017).
[43] Trakman *supra note* 20, 620.
[44] U.N. COMM'N ON INT'L TRADE, UNCITRAL Arbitration Rules, art. 28(3) (2013), (https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf) (last visited Nov. 14, 2017) [hereinafter "UNCITRAL Arbitration Rules"].
[45] *Ibid.*, art. 34(5).
[46] UNCITRAL Arbitration Rules, *supra note* 44, art.17.5.
[47] U.N. COMM'N ON INT'L TRADE, UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, art. 1 (2013), (http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf) (last visited Nov. 14, 2017) [hereinafter "UNCITRAL Transparency Rules"] (These rules are applicable to investor-State disputes commenced under UNCITRAL Arbitration Rules and where applicable investment treaties in the disputes are concluded on or after April 1, 2014).
[48] *Ibid.*, art. 2 & 3.
[49] UNCITRAL Transparency Rules, *supra note* 47, art. 4.
[50] *Ibid.*, art. 6 & 7 (The tribunal may conduct hearings in private if there is a need to protect confidential or protected information or if it is necessary, after consulting with parties, due to logistical reasons.)
[51] Bergman, N., *United Nations Convention on Transparency in Treaty-based Investor-State Arbitration* 54 ILM 4, 747-757 [hereinafter "Mauritius Convention"].
[52] *Ibid.*, art. 2 (Where investment arbitration is under investment treaties concluded before April 1, 2014).
[53] Mauritius Convention, *supra note* 51, art. 2 & 3.

In the light of UNCITRAL Transparency Rules and promulgation of Mauritius Convention, there is a greater shift to publication of documents involved in the disputes and third party attendance at hearings. This could very well apply to ICSID too.[54]

c. Cost of Litigation

A major criticism of international investment arbitration is the cost involved.[55] The ICSID proceedings are perveived to be particularly complex and costly. According to the United National Conference on Trade and Development (UNCTAD), costs in investor-State arbitrations in general have "skyrocketed" in recent years.[56] The cost of litigation in an ISDS case have averaged over USD 8 million with costs exceeding USD 30 million in some cases.[57] This is of particular consequence to developing countries. Critics have argued that developing countries lack the resources to bear the legal fees and related costs of defending against established investors.[58] These costs not only include the fees and expenses paid to ICSID and arbitrators during the pendency of the dispute but also the fee paid to the law firms, experts and witness required in the proceedings.[59]

Studies on international investor-State arbitration reveal that the average tribunal costs in the ICSID are relatively lower than an arbitration initiated in UNCITRAL.[60] According to ICSID, it aims to implement a cost-effective fee structure with the Secretariat fees as low as $42000 per year (which is incurred only by contracting States) and cap on arbitration fee of $3000 per day.[61]Furthermore, the average duration of the ICSID arbitration proceedings ranges from 3 to 3.6 years.[62] In UNCITRAL, parties have right to appeal the tribunal's fees to the appointing authority.[63] The appointing authority has the power of adjustment of fees and expenses, which is binding on the tribunal.[64] Moreover, it is also estimated that a substantial part of the legal costs incurred by the parties in investment arbitrations is payable to the lawyers and law firms involved in the matter.[65]

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[54] PARRA, ANTONIO R., THE HISTORY OF ICSID 290-291 (2ND ED., 2017).
[55] Profiting from Injustice, *supra note* 26, 15.
[56] *See* UNCTAD, *Latest Developments in Investor-State Dispute Settlement, IIA Issues Note*, UNCTAD/WEB/DIAE/IA/2010/3 (Mar. 2011), (http://www.unctad.org/en/docs/webdiaeia20113_en.pdf) (last visited Nov. 14, 2017); *See* UNCTAD, *Investor-State Disputes: Prevention and Alternatives to Arbitration*, UNCTAD/DIAE/IA/2009/11 (May 2010), (http://unctad.org/en/docs/diaeia200911_en.pdf) (last visited Nov. 14, 2017).
[57] *See* Gaukrodger, D. and K. Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, OECD WORKING PAPERS ON INTERNATIONAL INVESTMENT, 2012/03, 19 (2012) http://dx.doi.org/10.1787/5k46b1r85j6f-en (last visited Nov. 14, 2017).

[58] *See* World Bank Group, *Bolivia leaves the ICSID*, (http://web.worldbank.org/WBSITE/EXTERNAL/BANCOMUNDIAL/EXTSPPAISES/LACINSPANISHEXT/BOLIVIAINSPANISHEXT/0,print:Y~isCURL:Y~contentM DK:22766950~pagePK:1497618~piPK:217854~theSiteP K:500410,00.html) (last visited Nov. 14, 2017)
[59] Profiting from Injustice, *supra note* 26, 15.
[60] Mathew Hodgson, *Counting the Costs of Investment Arbitration*, 9 GLOB. ARB. REV. 2 (Mar. 24, 2014), (http://www.allenovery.com/SiteCollectionDocuments/Counting_the_costs_of_investment_treaty.pdf) (last visited Nov. 14, 2017).
[61] *See* ICSID's Schedule of Fees (Jul.1, 2017), (https://icsid.worldbank.org/en/Pages/icsiddocs/Schedule-of-Fees.aspx) (last visited Nov. 14, 2017).
[62] Anthony Sinclair *et. al*., *ICSID Arbitration: How long Does it Take?* 5 GLOB. ARB. REV. 5, 5, (http://www.goldreserveinc.com/documents/ICSID%20arbitration%20%20How%20long%20does%20it%20take.pdf) (last visited Nov. 14, 2017).
[63] UNCITRAL Arbitration Rules, *supra note* 44, art. 41.4.
[64] *Ibid*.
[65] Profiting from Injustice, *supra note* 26.

d. Annulment Mechanism

The awards rendered by ICSID are binding and not subject to any appeal or to any other remedy except those provided for in the ICSID.[66] The remedies provided for are revision[67] and annulment[68]. In addition, a party may ask ICSID which omitted to decide on any question submitted to it.[69] A party can also request for interpretation of the award.[70]

Upon the request for annulment, an *ad hoc* committee is established comprising of three arbitrators.[71] An *ad hoc* committee has authority only to annul a tribunal's award in whole or in part, or to leave the award intact, and any annulment must be based exclusively on one or more of the five grounds enumerated in Article 52 (1) of the ICSID Convention.[72]

Unlike an appellate tribunal, an *ad hoc* committee cannot review an award for errors of fact; while completely failing to apply the applicable law can be subject to annulment proceedings, misapplying the applicable law is not.[73] It cannot modify an award, replace it with its own decision, or remand it to the tribunal for a renewed decision.[74] The *travaux préparatoires* (negotiating history) of the ICSID Convention confirm that its drafters made a deliberate choice not to expand the grounds for annulment to encompass "violation or unwarranted interpretation of principles of substantive law."[75] According to Christopher Schreuer, an *ad hoc* committee "can destroy a *res judicata* but cannot create a new one".[76]

e. Arbitrator Bias

Critics of investment arbitration, including that of the ICSID, claim that the majority of arbitrators come from an investment background and create investors favouring biases.[77] According to the ICSID Caseload Statistics 2017, 47% of Arbitrators, Conciliators and *adhoc* Committee Members appointed in the ICSID cases are from Western Europe.[78] Arbitrators are

[66] ICSID, *supra note* 1, art. 53.
[67] *Ibid.*, art. 51.
[68] ICSID, *supra note* 1, art. 52.
[69] *Ibid.*, art. 49(2).
[70] Report of the Executive Directors, *supra note* 2, ¶41; ICSID, *supra note* 1, art. 50.
[71] ICSID, *supra note* 1, art. 52(3).
[72] ICSID, *supra note* 1, art. 52(3) (The grounds mentioned in art. 52(3) are: - (a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based.); MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Decision on Annulment, ICSID Rep. 508 ¶31 (Mar. 21, 2007).
[73] Amco Asia Corp. and Others v. Republic of Indonesia, ICSID Case No. ARB/81/1, Decision on Annulment 1 ICSID Rep. 509 ¶23 (May 16, 1986).
[74] Lamm, Carolyn B., *The standard of review in an ICSID annulment (Volume 354)* 35 in COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW, The Hague Academy of International Law (2011).
[75] ICSID, *History of the ICSID Convention* VOL. II-1, 340, (https://icsid.worldbank.org/en/Pages/resources/The-History-of-the-ICSID-Convention.aspx) (last visited Nov. 14, 2017) [hereinafter "History of the ICSID"].
[76] Christoph Schreuer *et al*., THE ICSID CONVENTION: A COMMENTARY 901 (2009) [hereinafter "Schreuer's ICSID Commentary"].
[77] *See* Gallagher, Kevin P. and Shrestha, Elen, *Investment Treaty Arbitration and Developing Countries: A Re-Appraisal*, 12 J. WORLD INVESTMENT & TRADE 919 (Dec. 2011).
[78] *See* ICSID, THE ICSID CASELOAD- STATISTICS (ISSUE 2017-2) 19 (2017), (https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202017-2%20(English)%20Final.pdf) (last visited Nov. 14, 2017).

given the label of "private judges" biased in favour of investors.[79] The President of Bolivia claimed that developing countries in Latin America "never win the cases. The transnationals always win."[80]

However, there is significant amount of divergent literature evaluating claims concerning investor bias in investment treaty arbitration.[81] It is essential to understand that claims regarding presence of investor bias in the ICSID proceedings by few developing countries do not expose a systematic bias in proceedings or awards against developing countries.[82] It is fair to state that arbitral loss of a few developing states in ICSID investor-State dispute does not translate into an overall net loss for developing states as a class.[83] Therefore, any claim regarding the existence of arbitrator bias cannot be considered to be completely accurate.

Having addressed the general criticism levied against ICSID, the article will proceed to examine whether the ICSID Convention can take into account the concerns of India regarding the investment treaty arbitration and wash away its unwillingness in signing and ratifying the ICSID Convention. For this purpose, the next part of the paper will begin with brief introduction of India's experience with investment arbitration. This is followed by the discussion of India's approach to investor-State arbitration and its comments during the drafting of the ICSID Convention. Thereafter, the paper will analyse whether the ICSID can accommodate India's approach to investor-State arbitration.

III. India and Investor-State Arbitration

India is one of the fastest growing economies in the world.[84] In order to attract foreign investment, Indian government has taken various measures since 1994 when it entered into the first BIT with the United Kingdom (UK).[85] During 1994 to 2000, India entered into BITs with almost all major European countries including France, Germany, Italy, Netherlands, Belgium, Denmark, Poland, Switzerland and Sweden.[86] From 2000 onwards, India entered into BITs with many developing countries including Argentina, Mexico, China, Thailand, Indonesia and Saudi Arabia, as well as with least developed countries such as Bangladesh, Sudan and Mozambique. Foreign investments in India by investors are governed by the FDI Policy issued by the Indian Government.[87]

In 2011, an UNCITRAL arbitral tribunal issued the final award against India in ***White***

[79] *See* Gus Van Harten, *Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration*, (Apr. 19, 2012), OSGOODE CLPE RESEARCH PAPER NO. 41/2012, (http://ssrn.com/abstract=2149207) (last visited Nov. 14, 2017).

[80] James M. Roberts, *If the Real Simon Bolivar Met Hugo Chavez, He'd See Red*, BACKGROUND PAPER NO. 2062,12, (The Heritage Foundation, Washington, D.C.) (Aug. 20, 2007).

[81] *See* Susan D. Franck, *Empirically Evaluating Claims about Investment Treaty Arbitration*, 86 N.C. L. REV. 1, 88 (2007); *See* Susan D. Franck & Linsey E. Wylie, *Predicting Outcomes in Investment Treaty Arbitration*, 65 DUKE L.J. 459, 526 (2015).

[82] Trakman, *supra note* 20, 611.

[83] Trakman, *supra note* 20, 611; Susan D. Franck, The ICSID Effect? Considering Potential Variationsin Arbitration Awards, 51 VA. J. INT'L L. 825 (2011).

[84] *See* World Bank, *World Bank Group. 2017. Global Economic Prospects, June 2017: A Fragile Recovery* (Jun. 2017), (https://openknowledge.worldbank.org/handle/10986/26800) (last visited Nov. 14, 2017).

[85] Ranjan, Prabhash, *India and Bilateral Investment Treaties – A Changing Landscape* 2 ICSID REV. 29, 419, 419-450 (2014) [hereinafter "India and Bilateral Investment Treaties"].

[86] Full list of India's BITs is available at Government of India, Ministry of Finance, Bilateral Investment and Promotion Agreement, (http://finmin.nic.in/bipa/bipa_index.asp?pageid=2) (last visited Nov. 14, 2017).

[87] *See* India's 2017 FDI Policy (http://dipp.nic.in/foreign-direct-investment/foreign-direct-investment-policy) (last visited Nov. 14, 2017).

Industries v. Republic of India.[88] The award in *White Industries* was followed by a series of investment treaty claims against India.[89] According to UNCTAD, twelve cases are currently pending against India.[90] India's reaction to this adverse finding has been to issue termination notices of 58 BITs including the treaties with the UK, France, Germany, Australia, China, Malaysia and others after India had expressed its intention to re-negotiate BITs.[91] India also introduced a new Model BIT in 2015 as a template for future investment agreements. [92] It is, therefore, necessary to understand how India wishes to negotiate future BITs with other countries and whether India would like to formulate its position on the possibility to join the ICSID Convention.

IV. India's approach to Investor-State Arbitration

Since there is no information available in the public domain, which highlights the concerns of India with respect to ICSID, recourse may be taken to the comments made by India during its participation in the drafting of the ICSID Convention. However, negotiating history is not sufficient enough to provide comprehensive account of India's position vis-**à**- vis ICSID. Therefore, the 2015 Model BIT framed by India will also be referred to as it reflects the revisionist approach India desires to take regarding investor-State dispute resolution.

1. Exhaustion of Local Remedies

India's 2015 Model BIT incorporates a complex and sequential dispute resolution procedure for investor-State disputes. An investor is first required to submit a claim to domestic courts or administrative bodies for resolution within one year from the time the investor acquired, or should have acquired, knowledge of the breach.[93] The investor is required to exhaust local remedies for a period of five years before it can submit a 'Notice of Dispute' to initiate arbitration.[94] Moreover, the investor cannot assert that the obligation to exhaust local remedies does not apply or has been met on the basis that the claim under this Treaty is by a different party or in respect of a different cause of action.[95] The 2015 Model BIT also makes it clear that a tribunal does not have the jurisdiction to 'review the merits of a decision made by a judicial authority of the Parties'.[96]

Article 26 of the ICSID Convention allows the contracting State to require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration to the ICSID. The condition may be expressed in a bilateral investment treaty offering consent to ICSID arbitration, in national legislation providing for ICSID arbitration or in a contract with

[88] *White Industries Australia Limited v Republic of India*, UNCITRAL, Final Award (30 November 2011) [hereinafter "White Industries Case"].
[89] India and Bilateral Investment Treaties, *supra note* 85, 441-442.
[90] *See* UNCTAD Investment Policy Hub Statistics, *India – as respondent State*, (http://investmentpolicyhub.unctad.org/ISDS/CountryCases/96?partyRole=2) (last visited Nov. 14, 2017).
[91] Economic Times, *India to renegotiate all bilateral investment pacts*, (Jul. 26, 2016), (http://economictimes.indiatimes.com/news/economy/policy/india-to-renegotiate-all-bilateral-investment- pacts-nirmala-sitharaman/articleshow/53385020.cms) (last visited Nov. 14, 2017).
[92] *See* Ministry of Finance, Government of India, *Model Text for the Indian Bilateral Investment Treaty*, (http://finmin. nic.in/the_ministry/dept_eco_affairs/investment_division/ModelBIT_Annex.pdf) (last visited Nov. 14, 2017) [hereinafter "2015 Model BIT"].
[93] *Ibid*., art. 15.1.
[94] 2015 Model BIT, *supra note* 92, art. 15.1.
[95] *Ibid.*
[96] 2015 Model BIT *supra note* 92, art. 13.5(i).

the investor containing an ICSID arbitration clause.[97]

Therefore, India's inclusion of the rule of exhaustion of local remedies will be acknowledged by the ICSID arbitrators if it chooses to accede to the ICSID Convention.

2. Definition of Investment and Compliance with Law of Host State

During the drafting of the ICSID Convention at the First Session of the Consultative Meeting of Legal Experts in 1964, India submitted that the ICSID Convention does not acknowledge that if a host State is duty bound to give just and equitable treatment to foreign investors then there was a corresponding obligation for investors to abide by national policies and laws of a host State.[98] In the 2015 Model BIT, India introduced a provision which mandates investors and their investment to be in compliance with the laws of the host State.[99] Moreover, while defining investment it adopts a hybrid asset-based and enterprise-based approach.[100] The 2015 Model BIT defines an "investment" as an "enterprise constituted, organised and operated in good faith by an investor".[101] Also, investment has to possess certain characteristics, such as: (i) commitment of capital or other resources; (ii) certain duration; (iii) the expectation of profit or gain (iv) the assumption of risk and (v) significance for the development of the Party.[102] These requirements similar to those propunded by the ICSID tribunal in *Salini Construtorri SpA and Italstrade SpA v. Kingdom of Morocco* (Salini), a dispute related to non-payment of construction of highway.[103]

Article 25 of the ICSID Convention outlines the limits of the ICSID's jurisdiction. However, it does not clearly define the concept of "investment."[104] A double barrel test is adopted by the ICSID arbitrators according to which the claimant will have to demonstrate the "investment" under both the applicable BIT and the ICSID Convention simultaneously.[105]

In *White Industries*, India objected to the jurisdiction of the UNCITRAL tribunal, relying on the *Salini*[106] test, that the term 'investment' requires a contribution of money or other assets of economic value, a certain duration over which the project is implemented and a sharing of operational risks. Additionally, it should also contribute to the host State's development.[107] However, the UNCITRAL Tribunal stated that because the case at hand was not an ICSID case, "the so-called *Salini Test* … [is] simply not applicable here".[108] In light of the ICSID jurisprudence, it seems that the concerns of India will be duly recognized by the ICSID.

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[97] Schreuer's ICSID Commentary, *supra note*, 404.
[98] History of the ICSID, *supra note* 75.
[99] 2015 Model Bit, *supra note* 92, art. 12.
[100] Hanessian Grant & Duggal Kabir, *Indian Model BIT: Is This Change the World Wishes to See?*, 1 ICSID REV 32, 216, (2015).
[101] 2015 Model BIT, *supra note* 92, art. 1.6.
[102] *Ibid.*, art. 1.4.
[103] Salini Construtorri SpA and Italstrade SpA v. Kingdom of Morocco, ICSID Case No ARB/00/4, Decision on Jurisdiction) ¶ 52 (Jul. 23, 2001) 6 ICSID Rep. 400 (2004) [hereinafter "Salini Case"].
[104] ICSID, *supra note* 1, art. 25.
[105] Phoenix Action Ltd. v. Czech Republic, ICSID Case No ARB/06/5, Award ¶114 (Apr. 15, 2009): - "(i) a contribution in money or other assets; (ii) a certain duration; (iii) an element of risk; (iv) an operation made in order to develop an economic activity in the host State; (v) assets invested in accordance with the law of the host State; (vi) assets invested bona fide."
[106] Salini Case, *supra note* 88.
[107] White Industries Case, *supra note* 88, ¶ 5.3.
[108] *Ibid.*, ¶ 7.4.9.

3. Enforcement of Arbitral Award

Pursuant to Article 54 of the ICSID Convention, each Contracting State is obligated to recognize an award as binding and enforce the obligations imposed by that award within its territories "as if it were a final judgment of a court in that State".[109] Enforcement of the arbitral awards rendered by the ICSID Additional Facility or the UNCITRAL arbitral tribunal or any other arbitral institution is subject to the law of the place of arbitration and the New York Convention.[110]

With respect to enforcement of arbitral award, India submitted during the drafting of the ICSID Convention at the Fourth Session of the Consultative meeting of Experts in 1964 that under general principles of municipal law, execution of international arbitral awards was subject to certain exceptions: *first,* where the dispute is not arbitrable under the law of the State concerned, and *second,* where enforcement of the award would be contrary to the State's public policy.[111] India relied on Article V(2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) to support its proposition of incorporating exceptions to enforcement of arbitral award.

Apart from India's comment during the drafting history of the ICSID, there exists no information on India's perspective on the ICSID Convention's enforcement mechanism of arbitral awards. In 2010, the Indian Council for Arbitration (ICA) recommended to the Ministry of Finance in India against India becoming a party to the ICSID Convention. According to the ICA, the ICSID Convention does not provide any scope for review of arbitral awards even if it is against the public policy.[112] Moreover, Article 14.10 (v) of the 2015 Model BIT states that enforcement of an award shall be in accordance with the law of the party where the award is sought to be enforced.[113]

In India, the legal framework for enforcement of foreign awards is contained in Part II of the Arbitration and Conciliation Act, 1996 (ACA).[114] Part II of the ACA deals with enforcement of foreign awards covered under the New York Convention. India became a Contracting State to the New York Convention by virtue of its ratification on July 13, 1960 and it has entered into force with effect from October 11, 1960. However, in accordance with Article I (3) of the New York Convention, it has declared that it will apply the New York Convention for the recognition and enforcement of awards made in the territory of a contracting State and "to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the law of India". [115]

The ACA does not specifically mention that it will be applicable to foreign investment arbitration awards and its applicability for the resolution of the investment disputes is still to

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[109] ICSID, *supra note* 1, art. 54.

[110] ICSID Arbitration (Additional Facility), *supra note* 7, art. 19 & 20 (Arbitration in Additional Facility can be done only in those states who are party to the New York Convention); 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 (Jun. 11, 2010), (http://www.thehindubusinessline.com/2000/06/11/stories/141144r2.htm) (last visited Nov. 14, 2017).

[113] 2015 Model BIT, *supra note* 92, art. 14.10(v).

[114] The Arbitration and Conciliation Act, Act No. 26 of 1996 INDIA CODE (1996).

[115] *See* Status - 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards, (http://www.newyorkconvention.org/countries) (last visited Nov. 14, 2017).

an extent disputable for the reasons explained below.[116] For the ACA to be applicable, the arbitral award sought to be enforced within the territory of India should in the first place qualify as a "foreign award. Section 44 of the ACA defines "foreign award" as an "arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force of India". However, neither the ACA nor the New York Convention defines the term "commercial". Therefore, it is not clear if investment arbitrations would be considered as "commercial" as they involve adjudication of regulatory actions of a State.

On this issue, the decision of the Calcutta High Court rendered on September 29, 2014 in *Board of Trustees of the Port of Kolkata v. Louis Dreyfus Armaturs SAS & Ors*[117], is illustrative. In this case, the Calcutta High Court while issuing the anti-arbitration injunction against Louis Dreyfus to prevent it from initiating an investment arbitration under the 1997 India-France BIT presumed ACA is applicable to investment arbitration awards. Similarly, on August 22, 2017 the Delhi High Court in *Union of India v. Vodafone Group*[118] while passing an *ex-parte* order restraining the Vodafone Group from pursuing an investment treaty arbitration claim against India under the India-United Kingdom BIT presumed the applicability of the ACA.[119] But in both cases the courts did not give any reason for their extension of the ACA to investment arbitration. Therefore, the issue still remains pending and the Indian government should bring necessary changes if it wishes to extend the application of the ACA and the New York Convention for enforcement of investment arbitration awards. In any event, if India wishes to apply the exceptions enumerated in the New York Convention for enforcement of foreign investment arbitration awards then the ICSID Convention's rule of automatic enforcement can be a stumbling block.

4. Governing Law in the disputes before ICSID

All of India's BITs in force have a provision about the applicable law. The BITs in force, generally, include the following provision as applicable law: -

"Applicable Laws

(1) Except as otherwise provided in this Agreement, all investments shall be governed by the laws in force in the territory of the Contracting Party in which such investments are made.

(2) Notwithstanding paragraph 1 of this Article nothing in this Agreement precludes the host Contracting Party from taking action for the protection of its essential security interests or in circumstances of extreme emergency, provided such actions have been prescribed by its laws which are applied normally and reasonably, on a non-discriminatory and a non-arbitrary basis."

[116] S. R. Subramanian, *BITs and Pieces in International Investment Law: Enforcement of Investment Treaty Arbitration Awards in the Non-ICSID States: The Case of India*, 14 J. WORLD INVESTMENT & TRADE 198, 198-239 (2013).
[117] *See* Calcutta High Court, *Board of Trustees of the Port of Kolkata v. Louis Dreyfus Armaturs SAS & Ors*, G.A. 1997 of 2017 (Sept. 29, 2014).
[118] *See* Delhi High Court, *Union of India v. Vodafone Group*, CS(OS) 383/2017 (Aug. 22, 2017).
[119] *See* Prabhash Ranjan & Pushkar Anand, *Vodafone Versus India: A BIT of Confusion* THE WIRE (Sept. 12, 2017), (https://thewire.in/176371/vodafone-versus-india-a-bit-of-confusion) (last visited Nov. 14, 2017).

Indian BITs also recognize that if there exists any obligation on either contracting party to the BIT under international law which grants more favourable treatment to the investments then such rules will be applicable.

Article 14.9 of the 2015 Model BIT defines the governing law for the BIT. As per that, "*the governing law for interpretation of this Treaty by a tribunal constituted under this Article shall be: (a) this Treaty, (b) the general principles of public international law relating to the interpretation of treaties, including the presumption of consistency between international treaties to which the Parties are party, and (c) for matters relating to domestic law, the Law of the Host State."*

Under Article 42(1) first sentence of the ICSID Convention, the applicable law is the law agreed by the parties to the dispute meaning that "parties are free to agree on the applicable rules of law."[120] As a result, parties may agree on domestic, international, both domestic and international, selected rules of a legal system or different rules of law to apply to different parts of the dispute.[121] Article 42(1) second sentence of the ICSID Convention refers to the situation where there is no agreement between the parties as to the applicable law. As per that, if there is no agreement, the ICSID tribunal applies the law of the Contracting State (including rules on the conflict of laws) and rules of international law as may be applicable.[122]

Article 54(1) of the ICSID Additional Facility Rules regulates the issue of applicable law in the following terms: reference is made to the law designated by the parties in the first place. *Second*, the absence of agreed rules by the parties calls the tribunals to identify the applicable law. Only in their absence will the tribunal consider applicable the law resulting from conflict of law issues and international rules that it considers applicable.[123]

Under the International Chamber for Commerce (ICC), Article 21 of the ICC Arbitration Rules defines the applicable law which states that the parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate. The arbitral tribunal shall take account of the provisions of the contract, if any, between the parties and of any relevant trade usages.[124]

In the UNCITRAL, the arbitral tribunal is allowed to apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract, if any, and shall take into account any usage of trade applicable to the transaction.[125]

From the perspectives of both the India government and Indian investors, the ICSID Convention is not different from other arbitration rules as far as provision relating to applicable law is concerned.

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[120] T. BEGIC, APPLICABLE LAW IN INTERNATIONAL INVESTMENT DISPUTES 5 (2005).
[121] Y. Banifatemi, *The law applicable in investment treaty arbitration*, *in* ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES 196 (K. Yannaca-Small ed., 2010).
[122] ICSID, *supra note* 1, art. 42.
[123]ICSID Arbitration (Additional Facility), *supra note* 7, art. 54.
[124] INT'L CHAMBER OF COM., ICC Rules of Arbitration, art. 21(3) (2012), (https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/) (last visited Nov. 14, 2017).
[125] UNCITRAL Arbitration Rules, *supra note* 44, art. 35.

V. Conclusion

With the opening up of global markets and emergence of newer mechanisms to facilitate flow of investment, it comes as no surprise that investment arbitration has become relatively more frequent in international dispute settlement. At the same time, it has also become more contentious with several countries backtracking on their commitment to investment treaties. This article has argued that while the ICSID Convention suffers from several shortcomings in respect of transparency, cost of litigation and arbitral bias, its accords certain countervailing benefits. There is considerable literature that ICSID compares favourably against other competing forums such as UNCITRAL even in relation to factors such as litigation costs and arbitral bias. In the matter of transparency, there is a converging view among various forums in providing greater transparency, openness and citizen participation.

Specifically, in regard to India, the question is whether joining ICSID could be adverse for India's interests. India's 2015 Model BIT has factored in the judicial thinking within the ICSID on several conceptual and definitional issues. It is safe to argue that India's new 2015 Model BIT is designed and crafted to avoid the pitfalls arising from any expansive interpretation of the ICSID doctrines and jurisprudential concepts. For example, certain features of the ICSID Convention relating to exhaustion of local remedies, definition of 'investment' and the 'applicable law' are in harmony with India's approach to these issues in its 2015 Model BIT. However, the thorny issue will be the enforcement of international investment treaty arbitral awards. India would be keen to retain some flexibility in questioning the enforceability of such awards to the extent that they conflict with the principles underlying India's domestic arbitration law. Domestic courts in India still have considerable power in determining the enforceability of foreign arbitral awards. While this factor does not render a definitive conclusion for India's stand on joining the ICSID, it would be pertinent for India to analyse whether domestic courts would in fact interfere with the awards of international investment tribunals. Given India's larger aim to become a hub for investment, it is crucial for India to identify and implement a cohesive approach on investment arbitration and possibly look at ICSID with a fresh mind.