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International Investment Arbitration under ICSID & Enforcement, Appeal Mechanisms & Practical Limitations

RAHUL KANNA R.N.[1]

ABSTRACT

In this paper, I would like to firstly introduce ICSID as an arbitral institution pioneering on Investor-State dispute settlements through a historical & juridical discourse of its inception by the World Bank Group & highlight the importance of arbitrator's independence & impartiality in the ICSID Convention through a critical analysis & imploration as a result of a wide public interest at stake in the arbitral proceedings undertaken. Further in this paper, I seek to engage in a critical study on the enforcement procedure, Appeal Mechanism & practical implication of the Convention awards to highlight certain hindrances & obstacles in enforcement procedures. Finally, the paper attempts to conceptualise & evaluate the interlinking & intertwining of the dual Conventions available for Investor-State Disputes with the help of Chevron- Ecuador investment arbitration & further evaluate as well as analyse the very possibility of enforcement of ICISD Convention awards through the residuary provisions of New York Convention.

Keywords: *Arbitration, Investor-State Arbitration, ICSID Convention, Independent Arbitrators, Enforcement Procedure, Appeal Mechanism-ICSID, New York Convention, World Bank Group, Chevron-Ecuador Investment arbitration.*

I. INTRODUCTION

International Centre for Settlement of Investment Disputes (ICSID) is the most pertinent of the few international organisations under the ambit of the World Bank. The convention by itself holds justice to its true character as according to Article 66(1), ICSID Convention, the amendment can only be effected by way of unanimous ratification of all the contracting member states and thus, this provision is a bane as well as a boon in terms of rigid & inflexible structure of the convention as a whole depending upon the point of view its seen through. However, the regulations & rules of the convention are eligible for amendment through a 2/3rd

[1] Author is a student at Jindal Global Law School, India.

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majority & simple majority in the case of Additional Facility Rules; over the past few decades since the inception of the convention, these provisions have been amended on several instances on the basis of the recommendation of the Secretariat.[2] There have been several important amendments with an objective to improve the legitimacy, efficiency & transparency of ICSID over the years, and I would attempt to undertake a brief discourse in analysing the amendments that have taken place since the end of the 20th Century coupled with the rampant growth of Bilateral-Investment Treaties which is considered as one of the major attributes to ICSID's development as several of these treaties began including arbitration provisions as recourse to disputes arising out of the BIT's. In terms of quantity, the number of BIT's by the turn of the 21st Century concluded 2000 BIT's treaties amongst 170 countries. Another determinant factor in contributing to the structural development of the convention in parlance to its efficiency & transparency is marked through (i) Foreign Direct Investment (FDI) which saw an astonishing rise since the 1990s owing to several factors, including the fall of the socialistic system of governance across the world on one hand & rise of globalisation coupled with the growth of transnational economies owing to improvements in technology, communication, infrastructure developments and (ii) Multilateral trade & investment Treaties including NAFTA & ECT and various other international treaties,[3] Thus both BIT's & other investment treaties provided a provision within itself whereby recourse in case of the dispute was for adjudication under ICSID, i.e. between the state & investors from other states and further this was also open for other non-contracting states on mutual consensus to arbitrate under the Additional Facility Rules proviso of the ICSID Convention.[4]

II. World Bank Group: Institution of ICSID- Legality & Legitimacy

The Legitimacy & Legality[5] of an organisation is the foremost characteristics in terms of understanding its features, objectives & practical limitations. The ICSID Convention, unlike other arbitral institutions in the world, did not come into existence through either the United Nations or through Diplomatic Conventions involving an array of countries, yet it continues to be the sole arbitral institution dealing with international investment arbitration involving states

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[2] International Centre for Settlement of Investment Disputes, ICSID Additional Facility Rules, 2006, available at http://www.worldbank.org/icsid/facility/AFR_English-final.pdf.

[3] United Nations Conference on Trade and Development, World Investment Report Overview 2015: Reforming International Investment Governance, at 24 fig.10, UNCTAD/ WIR/2015(Overview) (June 25, 2015); Christoph H. Schreuer, The Dynamic Evolution of the icsid System, inThe International Convention on the Settlement of Investment Disputes (icsid) 15, 20 (Rainer Hofmann & Christian J. Tams eds., 2007).

[4] R. Parra Antonio, 'ICSID And The Rise Of Bilateral Investment Treaties: Will ICSID Be The Leading Arbitration Institution In The Early 21 St Century?' [2020] Proceedings of the Annual Meeting (American Society of International Law) , APRIL 5-8, 2000, Vol. 94 (APRIL 5-8, 2000), pp. 41-43 Cambridge University Press on behalf of the American Society of International Law, https://www.jstor.org/stable/25659347

[5] Wolfrum 2011, para 1. Sources of International Law.

& Foreign individual/ corporation investors. The efficiency of an institution depends on its very structural framework & in case of an arbitral institution dealing with Complex matters in terms of the parties as well as the capital in dispute is therefore indirectly mandated to be Legitimate in its composition & effectiveness as well possessing the character trait of legality for the purpose of achieving the desired outcome & procedural enforcement issues needs to satisfy some foundational legal characteristics to avoid complex legal issues during the process of arbitration & its allied subjects when viewed from International Law perspective.

Prior to the inception of ICSID through World Bank Group, all matters regarding international investment was being dealt with under two segments (i) between the Nation-States through the use of Public International Law & IL theory Jurisprudence or (ii) Between two private individuals involving Domestic Law & Jurisdiction. ICSID, in terms of International Law & ADR Mechanism, revolutionised the system by providing a legitimate international forum for adjudication, thereby eliminating several hindrances faced by private investors in terms of adjudicating legal matters in a domestic court of the host state, which more often than not results in biased court proceedings, judgements & enforcement & matters of overpowering & bullying by the state urging private investors to compromise or receive no remedy and in most cases. However, in several cases, once a state gives consent to jurisdiction to an institution, it can at a later point opt out of voluntary participation as International Law works around the framework of voluntary consensus. Similarly, an attempt to do the same would be redundant under the ICSID Convention as any contracting state is liable to enforce an arbitral award once jurisdiction is consented to, thereby effectively easing the most pertinent limitation of International Arbitration, i.e. 'Enforcement of Arbitral Awards' in the domestic jurisdiction of the disputing party. Legitimacy has been a grey area for ICSID and at several times giving rise to something I would term as a ***'Legitimacy Predicament'*** by virtue of the convention's framework having been created & executed by World Bank officials, indirectly persisted a rather problematic approach in intervention with State Sovereignty & adjudication of State Regulation which generally fall outside the ambit of Public International Law & theory jurisprudence – ***'Legality Predicament'***.

The convention efficiently opted as means to establish a dispute mechanism instead of the mundane resolution passed by the World Bank as the latter would not be binding on the States. However, the former convention would be voluntary and once ratified; it would be binding as per the obligatory provision of International Law, thus eliminating the problems in enforcement & circumventing the Principle of ***'State Immunity & Jurisdiction'***. The creation of ICSID obtained legitimacy, which can be credited to the creation of Legal Committee comprising of

Legal State officials whereby even though the creation of the convention might not have occurred through the usual process, the essence of International law was met with as the Democratic character & Due process of law was justified as International Law also offers sufficient flexibility if its structural functionalities are abided in essence. Therefore, the question of Legitimacy & Legality of the ICSID Convention can purportedly be answered in the affirmative as the creation of a Judicial Dispute Resolving mechanism is embedded intra-vires the World Bank objectives through an interplay of 'Doctrine of Implied power' under International Law jurisprudence. Thus, the overall process of engaging in a unique discourse in the establishment of the convention has effectively improved the efficiency & transparency process without any or minimal compromise on ***'Legitimacy & Legality'***.

III. Impartiality & independence of ICSID convention & arbitration procedure

ICSID Convention, in essence, is particularly contrasting in terms of the adjudication mechanism it offers & the parties involved as the common principle of arbitration & its development is attributed to having a dispute resolution process whereby the individuals, i.e. private individuals/ corporations, place pertinence on arbitration process as it offers them an array of benefits which would not be available in case of an official Judicial recourse through Courts in terms of flexibility & choice of adjudicators. Hence ICSID has a greater responsibility as it involves a State as a party to it in all adjudications whereby the arbitral wards has a vast public function & impact in contrast to the de-facto arbitration between private individuals or enterprises. The statutory predicament of independence & impartiality of arbitrators is mentioned under Article 14, Para 1 of the ICSID Convention, which reads as arbitrators shall be "persons ... who may be relied upon to exercise independent judgment." [6]Similarly, the prerequisites for disqualifications of arbitrators is stated under Article 57 of the Convention, which reads as "a party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14…."[7]. on the basis of ineligibility as per Section 2 Chapter IV. It is also important to note the term 'Manifest', which by itself has been found several times in the convention used to describe exceptional Circumstances where there is a restraint on the fundamental right of the parties, therefore in practical terms, independent & impartial

[6] icsid Convention art. 14, para. 1 states the qualities required of members of the Panels of Conciliators and Arbitrators (icsid Convention art. 12–16). icsid Convention art. 40, para. 2 extends these requirements to arbitrators appointed from outside the panels.

[7] 'ICSID Convention | ICSID' (Icsid.worldbank.org, 2020) <https://icsid.worldbank.org/resources/rules-and-regulations/convention/overview>

arbitrators is rather not an exception for the parties to appoint arbitrators on free consent, but a fundamental right by itself to absolve the foreplay of bias 6(1) & partiality in the arbitral proceedings with remedies of disqualifications provided in the ICSID Convention(1) and furthermore such provisional remedies can be effected in reality only when the statutory requirement of independence surpassed the ***de minimis*** threshold like a personal connection with the parties excluding acquaintance or a formal relationship or when there exist financial proximity with either of the parties & general burden of establishing apparent bias is perplexing in practical terms compared to the theoretical implications.

In these adjudications involving complex Investor-State arbitrations, there is a minimal chance of satisfying all the participants in the arbitral mechanism, and thus ICSID is perplexed to provide a mechanism based on the proponents of ***'Fairness' & 'Transparency'***. Thus, in the case of ICSID parties, obligation in enforcement procedure is also very dependent on procedural fairness & as highlighted in the earlier segment of the paper, the ***'Legitimacy' & 'Legality'*** element can only be satisfied when the procedural integrity is established.

The framework circumscribing procedural integrity & fairness is more often than not dependent on the adjudicating & award passing authority- ***'Arbitrators'***. The impartiality & independence aspect of arbitrators is an extremely important & imperative element in arbitral proceedings as the arbitral mechanism is structured in such a way that unlike in the Judicial/ Court process, there exists substantial reliance on precedents & appealing authority, which is manifestly absent in the case of the arbitral proceeding including the ICSID Convention. Thus, creating a paradox as, on the one hand, a primary feature of arbitration is the choice of an adjudicator by the parties while on the other, the foremost limitation being that of 'independence of arbitrators & impartiality'. The Investor-State arbitration context can effectively be explained by Professor ***Van Harten*** on his discourse through procedural fairness, where he explains

"[I]f one asserts that investment arbitration offers a fair, rules-based, and thus superior method of decision-making, then the system is appropriately held to a high standard of independence." [8]

Therefore, the reliance on independence & impartiality of arbitrators needs to be given more weightage in terms of ICSID arbitration due to the ramifications & liability imposed on the States, thereby impacting the public interest in essence. Several Scholars have engaged in critical discourse in analysing the arbitrator's independence & impartiality through detailed

[8] Van Harten, Procedural Fairness.

statistics based on the rulings & dissenting opinions of arbitrators as well as in a comparative analysis to International Commercial Arbitration; there are differing opinions among scholars whereby some agree that their degree of test for independence of arbitrators needs to be scrutinised and increased whereas some believe the entire procedure is biased & others argue there needs to be an establishment of Permanent international investment court. However, after a detailed analysis of the ICSID Convention & its framework, the same can be corrected by way of increasing a degree of standard of arbitrators impartiality & independence test & another solution can be by way of enabling certain arbitrators from appearing for the same party in another proceeding & by way of continual temporary changes in the arbitrator's panel provided by ICSID administrative council.

IV. Enforcement & practical limitations of ICSID arbitral awards- case study

Investor-State dispute resolution (ISDS) can be enforced effectively depending upon the form of the institution of arbitral proceeding either under the ICSID Convention arbitration rules or UNCITRAL model rules. Similarly, the enforcement, annulment & appeal mechanisms depending on the parties choice of the forum comes under the respective ambits of the ICSID Convention or the New York Convention & it has been understood that both these forums have a large membership with around 150 Nations party to these conventions & have over the Decades produced a large number of Arbitral awards & several of which has been enforced by their respective procedures.

The ICSID Convention is an autonomous arbitral institution and thereby eliminating the purview of the national court's jurisdiction in the Conventions proceedings & awards. Section 5 ICSID Convention[9] pertains to matters of revision & annulment, Article 52 (1) provides grounds for annulment of the arbitral award through an application to the Secretary-General if any of the following grounds are satisfied:

(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

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[9] Ibid.

(e) that the award has failed to state the reasons on which it is based.[10]

The following grounds of annulment are widely similar to the grounds provided in the national arbitration laws, irrespective of a narrower interpretive possibility. However, there is a single pertinent provision that is completely absent in these grounds provided under the ICSID, i.e. annulment on the grounds of violation of public policy only exception being corruption. The enforcement of the ICSID award is provided under Section 6 Art 53 & 54, which also mandates for the award to be 'final & binding' further; it completely resolves the option of an appeal mechanism. All ICSID awards are automatically enforced in a sense these awards do not fall under the reviewing authority of national courts using their jurisdictional arbitration laws as the convention mandates for the recognition of the awards in the Contracting State as though it was a final judgement of a court in the respective state[11] & ICSID is therefore unique as it the only autonomous institution dealing with investment arbitration & this can also be attributed to the success of ICSID & preference of the same over UNCITRAL model rules arbitration in order to ease the process of enforcement & annulment for the claimant.

There have been several instances of practical limitations in the ICSID Convention provisions regarding the enforcement of awards. There has been an overarching conflict between the international investment treaty obligations of a state to that of internal laws & rules, which was explored in a recent 2017 judgment of the ***High Court of England & Wales*** in ***Micula & Others v Romania***.[12] The crux of the matter was that the tribunal must not pass an award for damages as the payments of damages would contravene with the provisions of State Aid Rules & thereby make it impossible for the award to be enforced in the EU and thus led to direct conflict between ICSID Convention obligations with that of the internal EU State Aid rules. The astonishing fact is that the EU is a ratifying member of the ICSID Convention along with the US, but Romania has simply rejected paying damages, citing the obstacle of EU State Aid Rules. The case in totality managed to reach a few conclusions even though several issues including (i) Res Judicata principle (ii) Precedence of International Investment Treaty obligation over the EU Laws as UK was a ratifying member of ICSID & further became a part of ICSID much before its association into the EU (Article 351 TFEU)[13] . The problematic

[10] Ibid.

[11] 1 James W Barratt and Margarita N Michael 'The 'Automatic' Enforcement of ICSID Awards: The Elephant in
the Room?' GAR (29 October 2013) <https://globalarbitrationreview.com/chapter/1036801/the-'automatic'-enforcement-of-icsid-awards-the-elephant-in-the-room>.

[12] Decided-(EU) 2015/1470 of 30 March 2015 on State aid S.A.38517 (2014/C) (ex 2014/NN) implemented by-Romania – Arbitral award Micula v Romania of 11.12.13, OJ L232/43, 04.09.15.

[13] THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION, Official Journal of the European Union

intertwining & interlinking of government Politics & legal issues are a result of the arbitral awards arising from International Investment Agreements. The focal point of the issue is not just concentrated to the EU, but this case highlights how there is a constant tension & conflict between international Investment treaty obligation to that of other internal state laws & treaties across nations globally, and in the case of the EU, the problem persists as to which of this takes precedence over the other.

V. New York convention vs ICSID convention: appeal & enforceability of arbitral awards - comparative analysis

The interaction of the two conventions play a pertinent role when it comes to Investor-state (ISDS) arbitration & the prerequisites for both these is that the proceedings need to be of arbitration while the New York Convention[14] also deals with the general enforceability of foreign arbitral awards the ICSID deals only with investment-state arbitrations exclusively. In general, when an arbitration proceeding partakes under the ICSID convention, then the appeal mechanism is not based on the national arbitration laws contrary to the situation under the New York Convention by virtue of its use of UNCITRAL Arbitration rule, whereas under ICSID Article 53 (1) which clearly mandates that awards rendered through the use of the convention is 'not subject to any appeal' exception being those provided under the convention and as of today there is no provision with regard to appealing mechanisms, which is attributable to the constitution of the ICSID which mandated a unanimous vote for amendments, leaving no room for a surprise as the convention has not been amended even once since its very inception. Another way in which an amendment may be effected is through a procedure in which the contracting states amend it 'inter se' through a separate international investment agreement through the Vienna Convention on the Law of Treaties (VCLT), 1969.[15] Yet, Legal barriers exist in attempting to modify the convention through VCLT as the ICSID Convention does not, in reality, prohibit the amendment or addition of appeal mechanisms. Unfortunately, the same might not be possible in reality, given the unanimous consensus prerequisites[16]. In addition to the existing arguments for amendment 'inter se' amongst contracting states, there is by

[14] 'Convention On The Recognition And Enforcement Of Foreign Arbitral Awards (New York, 1958)' (Uncitral.org, 2020) <https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf>

[15] Vienna Convention on the Law of Treaties 1969

[16] POSSIBLE IMPROVEMENTS OF THE FRAMEWORK FOR ICSID ARBITRATION ICSID Secretariat Discussion Paper October 22, 2004 (Part VI) https://icsid.worldbank.org/sites/default/files/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf

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International Law state practice of the same as done in the case of NAFTA,[17,18] with regard to the appointment of arbitrators where the Secretary-General of ICSID appoints the arbitrators in a situation of failure in constituting the tribunal.

There were certain solutions provided by ICSID Secretariate in its discussion paper[19] on the possible establishment of an Appeal Mechanism, such as the creation of the appeals facility rules as had been done with other rules circumventing the convention. However, the same could not be effected in practice and was dropped & there has been no deliberation on the same until today. The award of the ICSID Convention can be enforced by choosing to enforce it under the New York Convention, but the very constitutional character of the ICSID Convention & its high reputation provision of automatic enforcement of awards under Article 54[20] is effectively forgone. However, in the case of enforcement of an appeal of an arbitral award under the New York Convention also carries its own hindrances & obstacles even though it's in contrast to the enforceability of the ICSID Convention as under the former national arbitration laws are employed whereby the entire dynamics of the appeal mechanism depends very much on the national laws pertaining to arbitration of that state with jurisdiction over the arbitral tribunal as the New York Convention in totality leaves much to the disposal of each states national laws which can be reflected from the fact that the definition of 'arbitral award' is absent from the proviso of the convention contrary to the ICSID Convention. The only scenario where an award under the New York Convention can be made without reference to national arbitral laws of the state is in the case of a '***floating / stateless award',*** which happens when the arbitration proceedings are distanced from state arbitration laws through the use of a special agreement or a special treaty, popularly referred as 'De-Nationalized 'awards as Professor Van Den Burg postulates.[21] This results in a complex fiasco since there is no application of national arbitration laws there is also a complete absence of authority to oversee the proceedings or for annulment of the proceedings except the enforcing courts under the New York Convention depending upon if they choose to accept the arbitral proceeding as valid given it is 'stateless award' creating a foray of complex questions to be likely answered in the foreseeable future.

The dissimilarity between the two popular regimes of ISDS proceedings can be understood

[17] North American Free Trade Agreement (NAFTA), Enacted in 1994 creating a free trade zone between US neighbouring States.
[18] ICSID Convention (Sec 3) art 38 ; NAFTA (Sec 5) art 1124 similarly another distinction from the ICSID convention can be identified with regard to stay of enforcement of arbitral awards.
[19] Ibid
[20] Ibid
[21]Van den Berg, The New York Convention 1958

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through a brief yet critical analysis of the Chevron-Ecuador Investor-State arbitration[22] through evaluating the difference in the proceeding of the ICSID Convention & the New York Convention under the UNCITRAL Arbitration Rules. In this case, it was an investor-state arbitration between Chevron Ltd. & Ecuador; the former chose the UNCITRAL arbitration rules as per the BIT treaty between them, effectively ignoring the ICSID Convention, which was also an option Chevron possessed. Permanent Court of Arbitration was chosen as the arbitral institution giving Hague the jurisdiction as the seat of the arbitration & similarly Dutch Law was the governing law & Ecuador post the arbitral award had to approach the Dutch Courts[23] for annulment of the award as per the New York Convention & UNCITRAL Arbitration Rules & in terms of enforceability of the awards Ecuador may choose to prevent enforcement through Article V of the NY Convention under the ambit of the grounds listed for the same. In contrast, if Chevron had chosen ICSID Convention, then Ecuador would have to first seek an annulment of the award through the 'ad hoc'committee through an application & in a scenario where Ecuador refuses in enforcing the award of the ICSID Convention post the annulment process, then Chevron would be at an advantage as there are no grounds under which Ecuador can refuse to enforce the award & doing so would directly result in failure of treaty obligations. Therefore ICSID arbitration offers a more effecting enforcement scenario in comparison to the NY Convention under UNCITRAL Arbitration rules irrespective of the inhibitions & limitations of the ICSID Convention as a whole.

VI. ICSID CONVENTION AWARDS ENFORCEMENT UNDER THE NEW YORK CONVENTION: IS IT POSSIBLE?

The question is really important in pertinence to countries that are not a Member State under the ICSID Convention but is a contracting state of the New York Convention like India, for example, which has been a member of the latter convention since its ratification in 1960 while opting out of the former convention, another important matter which ICSID Convention does not encompass is the very fact of dealing with monetary obligations[24] & astoundingly leaving non-pecuniary issues ultra-vires the ambit of the convention. There might also be such scenario under which the contracting state of the ICSID Convention might amend the provisions of ICSID, especially with regard to appeal mechanism due to the absence of an appeal procedure under the convention through an 'inter se' amendment of the BIT's and this would have a direct

[22]Ecuador–United States Bilateral Investment Treaty [signed 27 August 1993, entered into force 11 May 1997 (terminated)] (Ecuador–US BIT) art VI(3)(a) <https://investmentpolicyhub.unctad.org/Download/TreatyFile/1065>.

[23] Hoge Raad [Supreme Court], 26 September 2014, Ecuador v Chevron, ECLI:NL:HR:2014:2837

[24] Ibid.

impact on enforcement procedure as the third country would not be a party to the BIT & ICSID thus creating a complex & perplexing situation of enforceability of the award. The general consensus of the question of enforcement under the New York Convention is answered in the affirmative by various scholars & the current jurisprudence available on this issue, but personally, I find it rather extremely perplexing in seeking the enforcement of an ICSID Convention award under the New York Convention except in a special situation as contemplated in the previous arguments & enforcement through the former convention also implies the application of the jurisdiction of the national courts of the executing/ enforcing state.

In theory, the ICSID Convention awards would come under the NY Convention as it comes under the ambit of Article I since most if not all ICSID arbitral proceedings take place in Washington unless a different place is chosen by the parties & generally, a place of arbitration is also the same as the place where the award is passed & as long as the territory where the award is passed is a contracting party of the NY Convention then by virtue of Article 1 the award can be enforced through the residual provisions of the New York Convention. In practice, certain courts, including the US Supreme Court, have broadly interpreted the texts of the NY Convention as not requiring a mandatory interlinking between arbitral proceedings & awards & the state arbitration laws along with the application of the convention to treaties. Similarly, another approach which can be undertaken is by considering the award to be a 'stateless 'award, but by doing so, there are several limitations & hindrances as the enforcing court might not consider the arbitral tribunal & award legitimate, thus making it merely impossible in enforcing the arbitral award.

VII. Conclusion

Investor-State arbitration has been synonyms with ICSID Convention to a large extent due to the rise of the International Investment Treaties across the world since the early 1990s, and the convention has played a pertinent & determinant role in the adjudication clause of these BIT's or IIA's in circumstances of disputes. Investment- State arbitration in general usually concerns major importance attributable to high level of monetary obligation involved as well as the public interest of the contracting state at large as the decisions of these arbitral tribunals has a direct & adverse impact on the subjects of the contracting states due to the monetary obligations which the country might need to oblige as well as the financial situation of the Investors needs to be firmly protected in order to ensure & prevent bias & partiality of the national courts of the state, thus it is pivotal in establishing an impartial & independent arbitrators under the

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convention in order for the overall framework & object of the ICSID Convention to be fruitful & ensure Due Process which is the need of the hour given the high number of challenge of arbitrators at ICSID over the past few decades since its inception hence reasonable solution & systematic scheming & filtering of the process involved in arbitrators panel can aide in reducing the number of these challenges in the future & also instilling confidence in ICSID Convention Proceeding. ICSID has been successful in limiting its enforcement procedures over the years by mandating enforcement of ICSID Convention award as prerequisite of a contracting state has helped in warding off the implication generally faced in enforcement of foreign arbitral awards, yet there has been instance of non-compliance with ICSID awards by contracting states or consistent application of annulment of the awards thus creating a unpleasant atmosphere for Investors as internal state decisions & change in political circumstance directly impact certain investment decisions and often 'State Immunity' is used to circumvent treaty obligations as in the recent case of 'Yukos' Arbitration, involving pecuniary settlements under the wider ambit of International Law & International Relations theory, Another problematic issue has been the ambivalence of an Appeal Mechanism excluding the 'ad hoc'committee which in contrast is present under the UNCTRAL Arbitration Rules making it attractive for parties to choose it over ICSID Convention irrespective of the numerous conveniences offered by the ICSID Convention.

Therefore, ICSID Convention, in reality, has made major strands in developing ISDS mechanism over the years since its inception & as an arbitral institution, has played a phenomenal role in aiding foreign-direct investment & also achieved the World Bank's objective of globalisation & creation of transnational economies in the contemporary world of the 21st Century. ICSID needs to make some structural changes which in practice is difficult to attain due to the very foundational pillar of the convention requiring unanimous votes as developing countries, including a growing number of Latin American countries, have pulled out of the convention & countries with exponentially growing economies such as India & Brazil have rather stayed distanced from the entering the convention due to its apparent leaning towards developed countries & absence of level playing field providing a dominant advantage to the western countries. Hence the path ahead for the ICSID Convention is to enhance its transparency & reliability to provide an efficient framework for enhancing confidence in contracting countries and also for attracting a larger membership, i.e. ICSID Convention needs to be the hallmark of the Investor-State Dispute Settlement system.

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VIII. References

1. Challenge of Arbitrators at ICSID—An Overview Author(s): Meg Kinnear Source: Proceedings of the Annual Meeting (American Society of International Law), Vol. 108, The Effectiveness of International Law (2014), pp. 412-416 Published by: Cambridge University Press on behalf of the American Society of International Law Stable URL: https://www.jstor.org/stable/10.5305/procannmeetasil.108.0412

2. INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES (ICSID): AZURIX CORP. v. THE ARGENTINE REPUBLIC (ICSID Case No. ARB/01/12) Author(s): ALEJANDRO A. ESCOBAR Source: International Legal Materials, 2008, Vol. 47, No. 3 (2008), pp. 445-447 Published by: Cambridge University Press Stable URL: https://www.jstor.org/stable/20695822

3. Current Issues in the Enforcement of International Arbitration Awards Author(s): Joseph E. Neuhaus Source: The University of Miami Inter-American Law Review, Fall, 2004, Vol. 36, No. 1, Symposium Edition: International Arbitration (Fall, 2004), pp. 23-39 Published by: University of Miami Inter-American Law Review Stable URL: https://www.jstor.org/stable/40176585

4. Appeal Mechanism for ISDS Awards: Interaction with the New York and ICSID Conventions Author(s): Albert Jan van den Berg Source: ICSID Review - Foreign Investment Law Journal, Volume 34, Issue 1, Winter 2019, Pages 156–189, Published by Oxford University Press on behalf of ICSID URL: https://doi.org/10.1093/icsidreview/siz016

5. The Development of the Regulations and Rules of the International Centre for Settlement of Investment Disputes Author(s): Antonio R. Parra Source: The International Lawyer, SPRING 2007, Vol. 41, No. 1 (SPRING 2007), pp. 47-58 Published by: American Bar Association Stable URL: https://www.jstor.org/stable/40708090

6. Enforcement of Investor-State Arbitral Awards Author(s): Kai Struckmann, Genevra Forwood, Aqeel Kadri and Adam Wallin Source: European State Aid Law Quarterly, Vol. 16, No. 2 (2017), pp. 316-321 Published by: Lexxion Verlagsgesellschaft mbH Stable URL: https://www.jstor.org/stable/10.2307/26694151

7. Enforcement of Investor-State Arbitral Awards Author(s): Kai Struckmann, Genevra Forwood, Aqeel Kadri and Adam Wallin Source: European State Aid Law Quarterly, Vol. 16, No. 2 (2017), pp. 316-321 Published by: Lexxion Verlagsgesellschaft mbH Stable URL: https://www.jstor.org/stable/10.2307/26694151

8. ICSID and the Rise of Bilateral Investment Treaties: Will ICSID be the Leading Arbitration Institution in the Early 21 st Century? Author(s): Antonio R. Parra Source: Proceedings of the Annual Meeting (American Society of International Law), APRIL 5-8, 2000, Vol. 94 (APRIL 5-8, 2000), pp. 41-43 Published by: Cambridge University Press on behalf of the American Society of International Law Stable URL: https://www.jstor.org/stable/25659347

9. INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES (ICSID): AZURIX CORP. v. THE ARGENTINE REPUBLIC (ICSID Case No. ARB/01/12) Author(s): ALEJANDRO A. ESCOBAR Source: International Legal Materials, 2008, Vol. 47, No. 3 (2008), pp. 445-447 Published by: Cambridge University Press Stable URL: https://www.jstor.org/stable/20695822

Books:

1. Book Title: The Independence and Impartiality of ICSID Arbitrators Book Subtitle: Current Case Law, Alternative Approaches, and Improvement Suggestions Book Author(s): Maria Nicole Cleis Published by: Brill Stable URL: https://www.jstor.org/stable/10.1163/j.ctt1w8h3hc.12

2. Chapter 8 The World Bank and the Creation of the International Center for Settlement of Investment Disputes: Legality and Legitimacy In International Organizations and the Promotion of Effective Dispute Resolution Author: Wenwen Liang Type: Chapter Pages: 103–120 DOI: https://doi.org/10.1163/9789004407411_009

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