International Economic Law Clinic

SHOULD COUNTRY X BECOME A MEMBER OF THE ICSID?

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Submitted for:

Country X

[We have retained as much information as possible to maximize utility of this report for the reader.]

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List of Abbreviations

Abbreviation	Long title
BIT	Bilateral Investment Agreement
FDI	Foreign Direct Investment
FTA	Free Trade Agreement
ICC	International Chamber of Commerce
ICSID Administrative and Financial Regulations	Administrative and Financial Regulations annexed to the Convention on the Settlement of Investment Disputes between States and Nationals of other States
ICSID Arbitration Rules	Rules of Procedure for Arbitration Proceedings under the Convention on the Settlement of Investment Disputes between States and Nationals of other States
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of other States
ICSID-AFR	International Centre for Settlement of Investment Disputes Additional Facility Rules
ISDS	Investor-State Dispute Settlement
MFN	Most Favoured Nation
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards
PCA	Permanent Court of Arbitration
SCC	Stockholm Chamber of Commerce

The Centre/ The ICSID	International Centre for Settlement of Investment Disputes
The ICSID Institution Rules	Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules)
The Mauritius Convention on Transparency	The United Nations Convention on Transparency in Treaty-based Investor-State Arbitration
The US/ the United States	The United States of America
TIP	Treaties with Investment Provisions
UN	The United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
VCLT	Vienna Convention on the Law of Treaties

Executive Summary

This report discusses the costs and benefits of becoming a Member of the ICSID (International Centre for Settlement of Investment Disputes) in the context of Country X. In doing so, it identifies the *status quo* in Country X with respect to foreign direct investment ("FDI"), and charts out the effect of ratification on Country X's international obligations. Investor-State dispute resolution is the focal point of this analysis.

There are five parts in this report, with several intermediate conclusions and one final word of advice for Country X. In the end we find it advisable for Country X to ratify the ICSID Convention.

After a short introduction, Part 2 lays down the debate's context by highlighting economic, political and legal aspects of Country X's FDI regime. It recognizes Country X as one of the fastest growing economies in the world, with consistently increasing amounts of incoming FDI flows. The report proceeds with the assumption that, for now, Country X is concerned with attracting FDI into the Country rather than protecting Country X's investment and investors abroad.

Part 3 reflects on Country X's ratification process, once it has signed the Convention. Ratification is fairly straightforward and simple; the only main significant change ratification would bring is in the way awards could be enforced against the Country. The fear of loss of regulatory autonomy seems exaggerated because the Convention does not grant substantive rights to investors.

Part 4 discusses the importance of "consent to arbitration" clauses in Country X's Bilateral Investment Treaties ("BITs") and multilateral agreements. There are two main conclusions: a) with or without the ICSID, investors have multiple avenues to sue Country X; and b) ratification would not lead to a rise in cases against the Country. Prior to ratification of the ICSID, Country X could add limitations on consent and thus exclude certain classes of cases from its jurisdiction, should investors select ICSID as the arbitration avenue. Further, Country X would be able to design a subdivision or entity that may

act independently and conclude contracts with investors. Finally, this section finds that Most Favoured Nation (“MFN”) treatment that extends to dispute settlement proceedings is not very significant since it is found in only one of Country X's international instruments (at the moment), and, in any case, it does not seem to be more advantageous than the one provided by the ICSID.

Part 5 forms the core of the report: it conducts a cost-benefit analysis of ICSID Membership, and juxtaposes International Centre for Settlement of Investment Disputes (“the Centre / the ICSID”) against other possible arbitration avenues. This part discusses both touted benefits of the ICSID and possible costs. The former category includes advantages relating to ‘depoliticization’, ‘stabilization’ and ‘specialization’. Depoliticization refers to prohibitions against interference with arbitral proceedings through the use of "non-legal" methods. However, this report finds this benefit to be largely theoretical. Stabilization refers to increased FDI inflows due to an increase in investor confidence, built upon the deterrence effect: large compensatory amounts in case of misconduct would prevent States from acting unfairly. The evidence for this, however, is far from concrete, and the report finds that this benefit does not always hold true in practice.

Finally, the argument behind specialization is that the ICSID provides for a nuanced and specific mechanism for Investor-State Dispute Settlement (“ISDS”), and the report finds that some aspects, including support by the secretariat and enforcement mechanisms, indeed constitute an advantage to ICSID Membership. From the outset, while the assumption is that ICSID is perceived advantageous for investors due its enforcement mechanism, this report proceeds under the assumption that Country X is neutral in this respect, as it is difficult to assess in the abstract whether or not it is preferable to Country X as compared to other ISDS forums.

In terms of monetary costs, this report finds that the ICSID is cheaper (though often marginally so) than other arbitration avenues. It also finds that post-ratification, there could be several reasons (other than ICSID membership) that could explain a rise of cases against Country X. As explained in the report, the experience of Argentina and Venezuela are proof of this. This part concludes that although ratification of the ICSID would not be very costly for

Country X, the Country should not expect any hard benefits (such as increased FDI inflows).

Finally, to confirm its findings, Part 6 looks at the ICSID experience of two "comparable" countries – Kenya and Bangladesh. Though neither Kenya nor Bangladesh – both Members of the ICSID – saw a surge in cases against them after ratification, there is no evidence to prove that ratification led to an increased FDI inflow either.

There also exist options other than the ICSID, which may become a reality in the near future. These include, for example, a multilateral investment court system. Getting involved in its negotiations would be a significant advantage for Country X since it would be a 'rule-maker' rather than an ICSID 'rule-taker'.

Thus, this report recommends that Country X ratifies the ICSID Convention so as to send a positive message to investors, while being aware that most of the Convention’s touted advantages are overstated or theoretical, all of which should be viewed with caution.

1. Introduction

This report gives a legal opinion on whether it would be desirable for Country X to ratify the ICSID Convention, in light of its existing FDI regime and international obligations relating to FDI. In doing so, the report examines dispute settlement provisions in BITs and other Treaties with Investment Provisions ("TIPs") signed by Country X.

This report proceeds as follows: first, it gives a brief overview of the investment climate in Country X, particularly regarding its economic situation and legal system;; second, it conducts a cost-benefit analysis of ratification of the Convention; and finally, it conducts a case study of the investment situation in Kenya and Bangladesh, two comparable countries which are Members of the ICSID. Throughout this analysis, a comparison is drawn between the ICSID system *vis-à-vis* other ISDS systems, namely the ICSID Additional Facility Rules ("ICSID-AFR"), [1] the International Chamber of Commerce ("ICC"), the Stockholm Chamber of Commerce ("SCC") and the United Nations Commission on International Trade Law ("UNCITRAL"). Foreign investors in Country X already have access to these systems under the existing BITs and TIPs.

2. Political, Legal and Economic Overview

Country X is a developing country, keen on attracting efficiency seeking investments into its territory. It is a net capital importer, hence this report assumes that there is little need – for now – to think of the ICSID Convention as a tool to protect Country X's investors abroad. Therefore, throughout this report, the discussion focuses on whether such ratification would attract more investment into Country X, while ensuring protection of the current foreign investments in Country X. Further, this report addresses whether Country X would be shielded from an increase in claims from foreign investors.

[1] The ICSID-AFR applies in disputes where only one disputant party is a Member of the ICSID (Article 2(a), ICSID- AFR), and in such disputes the ICSID Convention does not apply (Article 3, ICSID- AFR).

3. Effects of Ratifying the ICSID Convention

3.1. From Signatory to Member

The only obligation on the signatory of the Convention,[2] is to not defeat its object and purpose.[3] Ratifying the Convention (and becoming a Member once the Convention enters into force) would require Country X to conform to all ICSID obligations.[4]

Some fear that joining the ICSID reduces a Government's ability to regulate key areas of its economy.[5] However, on a conceptual level, such a fear is exaggerated.[6] This is because: first, the ICSID Convention does not create any substantive obligations against Member States (i.e. it is completely procedural);[7] second, as discussed below, upon ratification (or even later) Country X can remove a class (type) of dispute from the ICSID's purview;[8] third, ICSID proceedings are not automatic, in that Country X may require

[2] Please note that, in the report, only the ratification part of the process is explained, since the signature stage concerns mainly domestic issues, whereas this report focuses on international obligations of Country X.

[3] Article 18, Vienna Convention on the Law of Treaties, concluded at Vienna on 23 May 1969 [hereinafter: "VCLT"]. The object and purpose of a treaty is mostly located in its preamble. For the ICSID, see: Preamble, Recital 6, ICSID Convention, A treaty has no obligatory force prior to its entry into force in a country. See: M. A. Rogofl, 'The International Legal Obligations of Signatories to an Unratified Treaty', *Maine Law Review*, Vol. 32, 1980, p. 268.

[4] Article 26, VCLT, which requires the performance of treaties in good faith; See generally: N. Baird, 'To ratify or not to ratify'*, Manchester Journal of International Law*, Vol. 12, 2011, p. 4.

[5] This can be seen by recent denunciations of the Convention, as well as in academic commentary. See: F. Fontanellil, 'Does ISDS threaten States' Regulatory Autonomy? Fact-checking a commonplace of the TTIP Debate*',* SIDI Blog, 2015,: http://www.sidiblog.org/2015/03/03/does-investor-state-dispute-settlement-isds-threaten-states-regulatory-autonomy-fact-checking-a-commonplace-of-the-ttip-debate/, (accessed on August 4, 2017); L. Johnson and O. Volkov, 'State Liability for Regulatory Change: How International Investment Rules are Overriding Domestic Law'*,* Investment Treaty News, IISD, 2014 , https://www.iisd.org/itn/2014/01/06/state-liability-for-regulatory-change-how-international-investment-rules-are-overriding-domestic-law/, (accessed on August 4, 2017); M. Wagner, 'Regulatory Space in International Trade Law and International Investment Law'*, University of Pennsylvania Journal of International Law*, Vol. 36 Issue 1, 2015, p. 4 – 87.

[6] See E.A. Posner and A. O. Sykes, *Economic Foundations of International Law,* Cambridge and London, Harvard University Press, 2013, pp. 39 – 41. See in general: J.E. Nunez, *Sovereignty Conflicts and International Law and Politics: A Distributive Justice Issue,* London and New York, Routledge, 2017.

[7] The obligations (part of the applicable law in a dispute) are mostly contained in individual BITs or FTAs.

[8] Article 25(4), ICSID Convention. This has been done by, amongst some others, Jamaica (disputes concerning minerals or natural resources) and South Africa (for oil disputes and those pertaining to sovereignty), see I.F.I. Shihata, 'Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA'*, ICSID Review,* (1992), Vol. 1, p. 6. [hereinafter: "Shihata, Towards a Greater Depoliticization"]. See: Section 0 below.

exhaustion of local remedies (national courts etc.) as a prerequisite to commencement of arbitration.[9]

The only major change – in terms of dispute settlement – that will occur upon ratification, relates to enforcement of awards. This is discussed below at Section 5.1.3.7. As of now, investors can sue Country X under a BIT, TIP or other instruments (such as Governmental contracts) using any of these rules: ICSID-AFR, ICC, SCC, UNCITRAL or Permanent Court of Arbitration ("PCA).[10] The process of enforcement, as well as its success (i.e. finality of award), varies across these rules.

3.2. Ratification Process

To ratify the Convention, Country X must deposit an 'instrument of ratification' to the International Bank of Reconstruction and Development, affirming its willingness to carry out ICSID obligations. The Convention becomes binding 30 calendar days after the date of deposit of this instrument.[11]

In addition, Country X shall have to make the ICSID domestically "effective", i.e. execute "legislative or other measures" to make the ICSID operative in the Country.[12]

3.3. Conclusion

The process of ratification, as established under the Convention, is simple and the most consequential change is in the manner in which investment awards are recognized and enforced, as discussed in Section 5.1.3.7 below.

[9] Article 26, ICSID Convention.
[10] These avenues are selected for comparison later in this document because, as opposed to other possible arbitration avenues, the ICC, UNCITRAL and PCA rules (along with ICSID-AFR) are mentioned in Country X's BITs and TIPs, thereby signifying Country X's consent to be bound by them. See: Table 1.
[11] Article 68 (2), ICSID Convention.
[12] To be done according to constitutional procedures, see: ICSID, *Guide to Membership in the ICSID Convention,* https://icsid.worldbank.org/en/Documents/about/Guide%20to%20Membership%20in%20the%20ICSID%20Convention.pdf, (accessed 8 August 2017) [hereinafter: "ICSID Membership Memo"], p. 3. See also: Article 69, ICSID Convention.

4. Significance of the "consent to arbitration" clause and investor-state arbitration rules in Country X's domestic legislation, BITs and TIPs[13]

4.1. Introduction

For an investor to bring a claim against Country X under the ICSID Convention, (a) Country X must have concluded an agreement to consent with the party concerned;[14] and (b) the claimant must be a national of another ICSID Member.[15] Once Country X has made a written and explicit offer to the investor (which can be incorporated into either national legislation, in contracts entered into by States or authorized entities, or in a treaty entered into by the host State), the latter must accept it.[16] Once both parties have given consent, it cannot be withdrawn unilaterally.[17] The choice of which mechanism to resort to lies with investors since the host State has already granted its consent; it is thus up to the foreign investor to select an arbitration venue.[18]

4.2. Uniform model of consent

4.2.1 Country X's National Legislation

Country X domestic legislation does not provide for general access to international arbitration for FDI disputes. In particular, Country X's domestic legislation provides investors with the right to bring claims before domestic courts. However, it specifically excludes some classes of disputes from domestic jurisdiction. Thus, it is likely that investors wishing to sue Country X regarding such classes of disputes would resort to international arbitration. If the ICSID Convention is ratified, there will probably be no increase in such

[13] Please note that the conclusions that will be made under this section assess the repercussions of ratifying the ICSID Convention or not ratifying it purely based on one factor: the consent to arbitration; all other factors that might play for or against ratification are assessed in the other sections of the report.
[14] C. Schreuer, 'Dispute Settlement, International Centre for Settlement of Investment Disputes, 2.3 Consent to Arbitration', *Course on Dispute Settlement*, United Nations Conference on Trade and Development, 2003 p. 1, available at http://unctad.org/en/docs/edmmisc232add2_en.pdf, (accessed August 3, 2017) [hereinafter: "Schreuer, Consent to Arbitration"].
[15] Article 25, first sentence, ICSID Convention.
[16] Schreuer, Consent to Arbitration, p. 1
[17] Schreuer, Consent to Arbitration, p 1.
[18] Schreuer, Consent to Arbitration, p 1.

disputes since, as explained in Section 5.2.3 below, even absent the ICSID, investors still have other international instruments at their disposal to sue Country X.

In any case, the aforementioned exclusion does not cover efficiency seeking investments, which, as stated above, is the primary type of investment Country X currently receives. Therefore, claimants with this kind of investment can still sue Country X before its domestic courts.

4.2.2 BITs and Multilateral Agreements

Table 1 (annexed to this report) shows the investment instruments concluded by Country X. The following conclusions can be drawn:

A. There is no uniform model to consent. Out of the BITs concluded by Country X, only in one is there explicit consent given to the ICSID. In a minority of BITs, ICSID is mentioned as one of the possible avenues for arbitration, and it is mentioned that disputes may/shall be submitted to international arbitration. [19] In most BITs, the ICSID is simply mentioned as one of the possible dispute settlement mechanisms, but it is not further indicated that disputes may be submitted to arbitration.[20] In both of these models, consent will probably still be derived since there is a specific and explicit mention of the ICSID, which would arguably be read as the host State's intention to use it as an arbitration venue. As mentioned, where there is no hierarchy between the various *fora*, the choice of what avenues to resort to lies with the investor.

B. Regarding the consent given to dispute settlement mechanisms other than the ICSID, most of the BITs give consent to the competent courts of the host State; in particular, some to *ad hoc* tribunals, UNCITRAL rules, the ICSID-AFR, and to the ICC rules.[21] Hence, the preferred dispute settlement system in BITs is either domestic courts or the

[19] See: Table 1.
[20] *Ibid.*
[21] *Ibid*.

ICSID.[22] If Country X ratifies the ICSID Convention, and assuming that investors opt for international arbitration, it is likely that they will choose the ICSID rules (since it is the institution that has handled the largest number of cases, and by a considerable margin).[23] If, on the other hand, the Convention is not ratified, it is probable that investors would resort to domestic courts (since they can sue Country X directly without the need to conclude any further agreement). The fundamental conclusion here is that, even if Country X does not ratify the ICSID, foreign investors still have several other options through which to sue the Country.

C. Concerning multilateral agreements, out of all the agreements containing investment provisions concluded by Country X,[24] only one is currently in force and provide for direct access to ICSID proceedings. Regarding consent afforded to other disputes settlement mechanisms: in some, disputes are to be resolved by a regional court .One of these treaties also gives consent to domestic courts, to UNCITRAL Rules and to ICSID-AFR. Should Country X ratify the ICSID, only nationals of the countries that have ratified such treaty could resort to this venue. Therefore, the conclusion regarding multilateral agreements is the same as that for BITs: non-ratification of the Convention does *not* protect Country X from investors' claims.

4.2.3 Designation of constituent subdivision or agency

A State party to the Convention might also list a constituent subdivision[25] or an agency[26] (entities that carry out functions delegated by the government);

[22] In both systems, consent is given in [***] out of the [***] BITs Country X has concluded. See Table 1.
[23] See: UNCTAD, "Arbitral rules and administering institution", *investment policy hub UNCTAD* [medium], http://investmentpolicyhub.unctad.org/ISDS/FilterByRulesAndInstitution (accessed: 27 August, 2017). To be noted is that, the ICSID has handled/has been handling 480 cases (concluded and pending) as compared to the other institutions that count with a significantly lower amount of cases (88 by the Permanent Court of Arbitration; 36 by the Stockholm Chamber of Commerce; 6 by the International Chamber of Commerce etc.).
[24] See: Table 1.
[25] *Government of the Province of East Kalimantan v. PT Kaltim Prima Coal, Rio Tinto PLC, BP P.L.C., Pacific Resources Investments Ltd., BP International Ltd., Sangatta Holdings Ltd.& Kalimantan Coal Ltd.*, ARB/07/3, Award, 28 December 2009, para. 191. Tribunals found that "the term 'constituent

where the latter must also exercise a degree of control on them)[27] as the entity authorized to grant consent. This practice is referred to as "designation".[28] Thus, if the central government approves consent by the constituent subdivision or agency, consent to arbitration would bind the entire State.[29]

The main purpose of designation is to accord the entity a "limited international capacity" that enables it to become a party in the proceedings.[30] In contract-based arbitration where designation is found, the entity would even be able to appear as a claimant in the dispute. The implication is that, if Country X has designated an entity and the Country is itself not a party to the contract, the acts of such entity may *not* be attributable to Country X and the subdivision or agency would become the sole respondent. However, Country X will remain internationally liable, if the entity does not comply with its obligation of economic compensation.[31] On the other hand, in the case of a treaty-based arbitration, Country X itself would be the respondent of the claims and would not thus be able to evade the Centre's jurisdiction if a treaty provides ICSID Convention arbitration among its options.[32]

4.3. Limitations and conditions to consent

Country X has the right to set limitations on *ratione materiae*, *ratione temporis* and *ratione personae* to the consent given to arbitration. If Country X ratifies the ICSID, these limitations to consent would, in principle, remain unchanged (unless, pursuant to Article 25(4) of the Convention, Country X notifies that only a class or classes of disputes will fall under the Centre's jurisdiction). Notably, if the Convention is ratified, new conditions might be added, such as

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subdivisions' covers a fair range of subdivisions including municipalities, local Government bodies in unitary states, semi-autonomous dependencies, provinces or federated States in non-unitary States and the local Government bodies in such subdivisions."

[26] Niko Resources (*Bangladesh) Ltd. v. People's Republic of Bangladesh, BAPEX and Petrobangla*, ARB/10/11 & ARB/10/18, Decision on jurisdiction 19 August 2013, para. 286. The term "agency" refers to "State corporations such as national petroleum corporations, utilities, mining corporations, etc."

[27] *Ibid*, para. 228, 261.

[28] Article 25(1) and 25(3) ICSID.

[29] Article 25(1) and 25(3) ICSID.

[30] Supra n 26, para. 281, 329.

[31] See: Supra n 26, para. 209-256, 575.

[32] See: C. H. Schreuer et al., The ICSID: A Commentary, p. 151.

the requirement of exhausting local administrative or judicial remedies[33] or the prohibition of diplomatic protection regarding disputes falling under ICSID jurisdiction.[34]

4.4. MFN Provisions

There are divided tribunal decisions on whether MFN clauses can be invoked by claimants to modify the dispute resolution provisions in the applicable BIT. The key factor revolves around the *wording* of the MFN clause.[35] Generally, in order to extend MFN treatment to dispute settlement provisions, a clear mention of this intention is necessary.[36]

All of Country X's BITs, as well as one TIP, contain MFN provisions. However, only one BIT grants consent to ICSID *and* that has a broader MFN provision which would arguably extend such treatment to dispute settlement provisions.[37] Hence, only investors from the country that has concluded such an instrument would be permitted to rely on a more favourable provision in another Country X BIT (or *vice-versa*). However, this situation would probably not have a detrimental impact on Country X since the ICSID Convention is

[33] Article 26, ICSID Convention.

[34] Article 27, ICSID Convention. However, note that upon ratification of the ICSID Convention, Country X may not modify consent given under its BITs by virtue of this provision. See, for instance, *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction, 15 December 2010, in which Ecuador had filed a notification with the ICSID withdrawing consent in respect of exploitation of natural resources, such as oil, gas, minerals or others. In this case, Ecuador objected to ICSID's jurisdiction on the grounds of, *inter alia*, this notification. The Tribunal held that such notification did not modify the consent under the subject BIT (Ecuador and the United States), hence declined to make a finding in favour of Ecuador on this ground (although the Tribunal declined jurisdiction on other grounds). A prior Tribunal, *Alcoa Minerals of Jamaica, Inc. v. Jamaica*, ICSID Case No. ARB/74/2 (1975), Decision on Jurisdiction, July 6, 1975 held that Article 25(4) notifications operate only in the future, and do not unilaterally withdraw consent to arbitration. This decision is not public, but is discussed in I. Vincentelli, 'The Uncertain Future of ICSID in Latin America', 2009, available at https://ssrn.com/abstract=1348016 or http://dx.doi.org/10.2139/ssrn.1348016, (accessed on August 31, 2017), [hereinafter: "Vincentelli, Future of ICSID in Latin America"], p. 29-30.

[35] UNCTAD, 'Recent Developments in Investor-State Dispute Settlement (ISDT)', *Issues Note IIA,* N 1 April 2014, p. 17.

[36] See: *Garanti Koza LLP v. Turkmenistan* (ICSID Case No. ARB/11/20), Decision on the Objection to Jurisdiction for Lack of Consent, 3 July 2013, para. 79. In this case, the tribunal decided that the MFN treatment enshrined in Article 3(3) of the U.K.-Turkmenistan BIT were to extend to dispute provisions because such article provided that MFN treatment accorded 'shall apply' to the dispute resolution provision of the BIT. Also see: *Kılıç _İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan* (ICSID Case No. ARB/10/1), Award, 2 July 2013, para. 7.6.17. In this other case, the tribunal found that the MFN clause could not be applied to the dispute resolution provisions of the underlying treaty (namely Turkey-Turkmenistan BIT) because such clause had a strict wording and did not provide for the possibility of extending MFN treatment to dispute settlement provisions. Hence, the claimant could not rely on a more favorable provision in another of Turkmenistan's BITs.

arguably more beneficial to foreign investors only in respect of domestic courts, but not *vis-à-vis* other international avenues.[38] The specific wording of subsequent BITs can limit a broad interpretation, for example, through exclusion of ISDS from MFN application.

4.5. Conclusion

The above analysis suggests that ratifying the ICSID Convention would probably not amount to an increase in number of disputes against Country X. This is because, even in the absence of the ICSID, investors have other powerful instruments to pursue arbitration, particularly other ISDS *fora* provided for in BITs. Even if Country X decides to denounce all its BITs, survival clauses found in them would still enable investors to pursue claims, at least for some time.[39] Further, regarding MFN clauses, the *status quo* would suggest that there would probably be no detrimental impact for Country X should an ICSID Arbitration Panel decide to extend MFN treatment found in [***] BIT to dispute settlement provisions.

5. Cost & benefit analysis of ratification of the ICSID Convention

This part discusses three elements of the ICSID that are considered advantageous over other investment dispute settlement *fora*: de-politicization, stabilization and specialization. It then discusses possible costs that could come with ratification, specifically: loss of regulatory autonomy, increase in cases, monetary costs, and time taken for completion of disputes.

[38] Section 5.1.3 below compares the ICSID Convention with other international options for arbitration and thus will not be discussed at this point.

[39] See: J.C.B. Rivera and M.V. Azuga, 'Life after ICSID: 10th anniversary of Bolivia's withdrawal from ICSID', *kluwerarbitrationblog* [medium], http://kluwerarbitrationblog.com/2017/08/12/life-icsid-10th-anniversary-bolivias-withdrawal-icsid/ (accessed on 27 August, 2017). For instance, see the case of Bolivia that, even after having withdrawn from the ICSID Convention, investors sued Bolivia in other fora, in particular resorting to BITs and, even after they had been denounced, to survival clauses of the same.

5.1. Possible Benefits

5.1.1. Depoliticization: The Benefit that Isn't

5.1.1.1 What is 'depoliticization'?

Justice is an integral part of dispute resolution as it implies fairness, which necessitates neutrality. Depoliticization is (purportedly) an attempt to promote fairness in investment dispute adjudication: it prohibits States from using non-legal means to influence the result of an investment dispute.[40] Depoliticization requires States to not employ domestic courts and/or foreign power to frustrate international arbitration proceedings.[41]

5.1.1.2 Depoliticization under ICSID

Since the beginning,[42] supporters of the ICSID Convention have forwarded depoliticization as a genuine and serious benefit – it was argued that the ICSID balances investor and host State interests by disallowing States from exerting influence[43] on the neutral and "self-contained" ICSID system.[44]

Articles 26 and 27 of the ICSID Convention seem to incorporate depoliticization: the former disallows "any other remedy" (except arbitration) once consent has been established, and the latter explicitly prohibits "diplomatic protection". However, the Convention creates an exception for situations where a disputing party does not comply with a rendered award,[45] and for "informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute".[46] Thus, as per its text, the ICSID Convention does not incorporate an *absolute* (or strict) requirement for depoliticization.[47]

[40] For definition, see: S. Jandhyala, G. Gertz and L. N. Skovgaard Poulsen, *Legalization & Diplomacy: American Power and the Investment Regime*, Draft, 2016, https://www.princeton.edu/politics/about/file-repository/public/Legalization-and-diplomacy_Poulsen.pdf (accessed 25 August 2017), p. 9. [hereinafter: "Jandhyala, Gertz & Poulsen (2016)"]
[41] It is worth noting that investment law is the only field of international dispute resolution where such removal of State power is required, or mooted as a benefit.
[42] And specifically to oppose the Drago and Calvo doctrines developed in South America.
[43] Often referred to as "State espousal" or "diplomatic protection".
[44] For the classical position, see I.F.I. Shihata, Towards a Greater Depoliticization.
[45] Article 27(1), ICSID Convention.
[46] Article 27(2), ICSID Convention.
[47] Particularly because "informal exchanges" initiated by a powerful nation would carry more than enough weight to influence the dispute. See: See: J. Pauwelyn, 'At the Edge of Chaos? Foreign

5.1.1.3 Can (and does) depoliticization really exist?

The practical problem with depoliticization is that it is not real: all international disputes are political by nature;[48] attempting to remove political influence from an (allegedly) "purely-legal" dispute is naïve. Practice shows that *with or without the ICSID*, countries resort to “diplomatic channels” to influence the outcome of investment disputes.[49] State influence begins with selection of arbitrators,[50] and can extend to *after* the award is rendered, (for example by resisting enforcement in domestic courts).[51] The use of national courts at the pre-award stage is also an example of State intervention, and this has happened under almost all arbitration rules.[52] Further, explicit ICSID restrictions aside, a State can still invoke arbitration under its own right.[53]

Investment Law as a Complex Adaptive System, How It Emerged and How It Can Be Reformed', *ICSID Review,* Vol. 29, Issue 2, 2014, fn 170 to Part V. C.

[48] H. Lauterpacht, *The Function of Law in the International Community,* Oxford, Clarendon Press, 1933, pp. 153, 155. Investment disputes frequently address "politically sensitive" questions relating to Governmental regulation, and are thus inherently political. See: M. Paparinskis, 'Limits of Depoliticization in Contemporary Investor-State Arbitration', *Select Proceedings of the European Society of International Law*, Vol. 3, 2012, pg. 4. [hereinafter: “Paparinskis, Depoliticization”]; C. Titi, 'Are Investment Tribunals Adjudicating Political Disputes? Some Reflections on the Repoliticization of Investment Disputes and (New) Forms of Diplomatic Protection', *Journal of International Arbitration*, Vol. 32 No. 3, 2015, p. 265 – 266, 281 – 285. [hereinafter: “Titi (2015)”]. Some believe that investment disputes get "re-politicized" when they undergo adjudication. See generally Titi (2015); A. Roberts, 'State-to-state investment treaty arbitration: A hybrid theory of interdependent rights and shared interpretive authority', *Harvard International Law Journal*, Vol. 55(1), 2014, p. 4.

[49] G. v. Harten, *Investment Treaty Arbitration and Public Law*, Oxford, Oxford University Press, 2007, p. 173-174, cited in Paparinskis, pg. 15. The behaviour of the US is particularly telling in this regard, and it is far from the only country which is responsible. See: Jandhyala, Gertz & Poulsen (2016), pp. 14 – 28. There now exist "innovative" ways of pressurizing host States, for example through negative votes on renewal of international bank loans, and through suspension of trade benefits. See: Titi (2015), pp. 281 – 285. Other pressurizing tactics include parallel proceedings (particularly under the WTO), see: R. P. Alford, 'The Convergence of International Trade and Investment Arbitration', *Santa Clara Journal of International Law*, Vol. 12 (1), 2013 p. 50 cited in Titi (2015)at p. 279; See: Titi (2015), pg. 279 – 281.

[50] G. v. Harten, *Investment Treaty Arbitration and Public Law*, Oxford, Oxford University Press, 2007, p. 173-174, cited in Paparinskis, pg. 15.

[51] See: studies on behaviour of European states, as well as the US, in Jandhyala, Gertz & Poulsen (2016), p. 10.

[52] For ICC, see *Saipem S.p.A.* v *The People's Republic of Bangladesh,* ICSID Case No. ARB/05/07; For ICSID, see *Chevron Bangladesh Block Twelve, Ltd. and Chevron Bangladesh Blocks Thirteen and Fourteen, Ltd.* v *People's Republic of Bangladesh,* ICSID Case No. ARB/06/10.

[53] M. Paparinskis, 'Investment Arbitration and the Law of Countermeasures', *British Yearbook of International Law*, Vol. 79, 2008 [hereinafter "Paparinskis (2008)"]. Notably, the 2006 ILC Articles of Diplomatic Protection recognizes the *right* to diplomatic protection. See: International Law Commission, ‘Draft Articles on Diplomatic Protection with Commentaries’ in Report of the International Law Commission on the Work of its 61st Session UN Doc A/61/10 15 Art 19(a), cited in Paparinskis (2008), p. 13.

5.1.1.4 Conclusion

"Politicization" of disputes is real and unavoidable.[54] Thus, the perpetrated benefit of "depoliticization" is largely theoretical and does not hold much, if any, practical weight.

5.1.2. Stabilization: Rule of law to attract FDI?

5.1.2.1. Theory and warning behind the stabilization function

Sergio Puig[55] well depicts another theoretical function under which the ICSID's effectiveness should be assessed: *stabilization*, where the Centre serves as an international public policy institution.[56] The premise is that FDI by private enterprises leads to economic growth and development.[57] Well-defined property rights (contained in different legal instruments) and assured access to reliable dispute settlement *fora* encourage FDI.[58]

Under this perspective, the ICSID is properly tailored to allow large flexibility in the implementation of economic policies involving the private sector, and ensuring FDI protection by establishing a mechanism for enforcement aimed at discouraging opportunistic governmental behaviour.[59]

Hence, ratification of the ICSID Convention would enhance Country X's image abroad as an investment-friendly Country.[60] It would boost foreign investors' confidence, in that arbitral awards in Country X would be assured recognition and enforcement, and thus the risk (and cost) of their investment would be

[54] Titi (2015), p. 287; see also Paparinskis, Depoliticization; C.H. Brower II, 'Obstacles and Pathways to Consideration of the Public Interest in Investment Treaty Disputes', *Yearbook of International Investment Law & Policy,* Vol. 1, 2008 - 2009, p. 367-368. See also footnote 101 on p. 367.
[55] S. Puig, 'Recasting ICSID's Legitimacy Debate: Towards a Goal-Based Empirical Agenda', *Fordham International Law Journal*, Vol. 36, 2012. [hereinafter: "Puig, Recasting ICSID's Legitimacy Debate"]
[56] The literature behind it hails from insights from international law, international organizations and legal theory and, in particular, from Ibrahim F. I. Shihata's and Dr. Aron Broches' writings and ideas. See: M. Nijhoff, 'The Convention on the Settlement of Investment Disputes between States and Nationals of Other States', in *Selected Essays: World Bank, ICSID, and other Subjects of Public and Private International Law*, 1995, p. 198.
[57] Note By A. Broches, General Counsel, Transmitted To The Executive Directors: 'Settlement Of Disputes Between Government And Private Parties', 1961, in History Of The Convention, Vol. II, Part. 1, Doc. 1, 1968, p. 2. [hereinafter: "Broches, Settlement of Disputes"]
[58] Broches, Settlement of Disputes, p. 2.
[59] Puig, Recasting ICSID's Legitimacy Debate, p. 14.
[60] A.L. McDougall, 'Why has Canada Not Ratified the ICSID Convention?', kluwerarbitrationblog [medium], http://kluwerarbitrationblog.com/2010/08/24/why-has-canada-not-ratified-the-icsid-convention/, (accessed on 31 August, 2017) [hereinafter: "McDougall , Why Canada has not Ratified the ICSID"].

reduced.[61] However, it is very difficult to assess whether this function actually occurs or whether it is mostly a theoretical benefit: the lack of clear evidence would arguably suggest the latter.[62]

5.1.2.2. Conclusion

In sum, stabilization and the resulting benefits, such as increased influxes of FDI, cannot be counted as real benefit of ICSID Membership since empirical evidence is limited.

5.1.3. Specialization

5.1.3.1 Introduction

While there are other *fora* for ISDS, ranging from domestic courts to diverse forms of international arbitration *fora*, the ICSID is specialized, in that it allows only for ISDS, unlike other *fora*, which allow for commercial arbitration as well. [63] Further, the requirements for professionalism, competence and neutrality have been put across as factors which make the Centre a neutral

[61] A.L. McDougall, J.C. Hamilton, 'ICSID Growth Continues as Canada Ratifies and Cases Diversify', whitecase, [medium], https://www.whitecase.com/publications/alert/icsid-growth-continues-canada-ratifies-and-cases-diversify, (accessed on 31 August, 2017); McDougall , Why Canada has not Ratified the ICSID; The Organisation for Economic Co-operation and Development, 'OECD Investment Policy Reviews: Lao PDR', OECD Investment Policy Reviews, 2017, available at: http://www.keepeek.com/Digital-Asset-Management/oecd/finance-and-investment/oecd-investment-policy-reviews-lao-pdr-2017_9789264276055-en#.WafbHq2B1AY, (accessed on August 31, 2017); M. Al-Kaissi, 'Means for the Settlement of Commercial & Investment Disputes In the light of the International Treaties and Conventions', available at: http://www.josemigueljudice-arbitration.com/xms/files/02_TEXTOS_ARBITRAGEM/01_Doutrina_ScolarsTexts/investment_arbitration/Means_for_the_Settlement_of_Commercial_Investment_Disputes.pdf; https://books.google.es/books?id=_sErDwAAQBAJ&pg=PA89&lpg=PA89&dq=icsid+convention+to+boost+investors+confidence&source=bl&ots=nGry0jB7Po&sig=rWNZAkWeCPQO5_L6qjbdrqabapU&hl=en&sa=X&ved=0ahUKEwiGvKj4k_zVAhUjMJoKHY0hDFkQ6AEITTAH#v=onepage&q=icsid%20convention%20to%20boost%20investors%20confidence&f=false, (accessed on August 31, 2017); The Organisation for Economic Co-operation and Development, "OECD Investment Policy Reviews: Lao PDR", OECD Investment Policy Reviews, 2017, available at: http://www.keepeek.com/Digital-Asset-Management/oecd/finance-and-investment/oecd-investment-policy-reviews-lao-pdr-2017_9789264276055-en#.Weh7EvlL-Ul, (accessed on August 31, 2017).

[62] See, *inter alia*: Jason Webb Yackee, 'Conceptual Difficulties in the Empirical Study of Bilateral Investment Treaties', *Brooklyn Journal of International Law*, Vol. 33, 2008; M. Hallward-Driemeier, 'Do Bilateral Investment Treaties Attract FDI? Only a bit… and they could bite', [webpage] http://documents.worldbank.org/curated/en/113541468761706209/105505322_20041117160010/additional/%20multi0page.pdf, (accessed June 24, 2017), p 22.

[63] It was touted as a specialized forum for dispute settlement from the outset. See S. Puig, 'Emergence & Dynamism in International Organizations: ICSID, Investor-State Arbitration & International Investment Law'. *Georgetown Journal of International Law*, vol 44, 2003, p. 548, available from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2297219, (accessed June 3, 2017), [hereinafter: "Puig, Emergence & Dynamism"] citing: Ibrahim Shihata, Remarks on the Obstacles Facing ICSID's Proceedings and International Arbitration in General, *News From ICSID* (Winter 1986).

forum for dispute resolution.[64] This part of the report analyses whether this is in itself a benefit, and whether this adds value to a country that ratifies the ICSID Convention (as compared to other ISDS avenues).[65] It discusses the following, in turn: role of a standing secretariat; jurisdictional scope of the ICSID; duration of arbitration proceedings; competence, impartiality and neutrality of arbitrators; transparency provisions; and finality of awards. From the outset, while the assumption is that ICSID is perceived advantageous for investors due its enforcement mechanism, this report proceeds under the assumption that Country X is neutral in this respect, as it is difficult to assess in the abstract whether or not it is preferable for Country X as compared to other ISDS forums.

5.1.3.2 The ICSID Secretariat

The Secretariat of the ICSID carries out several functions that may benefit Country X. First, Country X could take part in the modification and development of the Centre's procedures and rules, its administrative and financial regulations, and the operations that the Secretariat carries out through representation in the Administrative Council. Second, the ICSID Secretariat screens claims brought by investors so as to ensure that illegitimate claims are not filed against Country X. Finally, the Secretariat would boost transparency by allowing public access to general information in its Register and by ensuring that, regardless of the parties' consent, excerpts of the tribunal's reasoning are published. This action is likely to raise the confidence of both, the public and the investors, in the investment regime of Country X. It would further develop international law by allowing States to be better informed of past decisions as well as generally create coherence in the international investment legal system.

[64] Puig, Recasting ICSID's Legitimacy Debate, p. 11.
[65] ISDS should be distinguished from commercial arbitration because the former is treaty-based, in addition to the impact being a 'sort of administrative review of Governmental acts'. See: N. Horn, 'Current Use of the UNCITRAL Arbitration Rules in the Context of Investment Arbitration', *Arbitration International*, Vol. 24, No. 4 (2008), Pages 587–602, available at https://doi.org/10.1093/arbitration/24.4.587, (accessed on July 18, 2017). [hereinafter: Horn, UNCITRAL Arbitration Rules]

If Country X does not ratify the Convention, (whereas it is true that some services are already available under the ICSID-AFR), it would not be able to influence the operations and governance of the Centre and appoint arbitrators to the ICSID Panel. Furthermore, since in *ad hoc* arbitration both parties must agree on the administrative steps of the proceeding, predictability is decreased and proceedings might be delayed if the parties cannot reach an agreement.

5.1.3.3 Scope of Jurisdiction

The ICSID Convention can be said to have a limited scope of jurisdiction as compared to other arbitration *fora* for three reasons, which are discussed hereunder: (i) the gate-keeping function of the Secretary-General; (ii) the *double-barrelled* test; and (iii) the limitation on dual-nationals as claimants.

A. Article 25 of the ICSID Convention limits the jurisdiction of the Centre to disputes between a Contracting State and a national of another Contracting State. Unlike other arbitral *fora* (including ICSID-AFR),[66] Article 36(3) of the Convention allows the Secretary-General of ICSID to refuse registration of a request for arbitration 'on the basis of the information contained in the request' indicating 'that the dispute is manifestly outside the jurisdiction of the Centre'. This provides a filter on the disputes being filed, and avoids 'unworthy claims' coming to the Centre.[67] While this would shield Country X from frivolous claims brought before the ICSID, this advantage is greatly limited for two reasons: first, the wording of the provision limits the exercise of these powers to "incurable defects", which is a very high standard to reach;[68]

[66] Article 4 of the ICSID-AFR limits the role of the Secretary-General to registration of requests for arbitration upon confirming that such request conforms to the formal requirements for filing requests.
[67] S. Puig and C. Brown, 'The Secretary General's Power to Refuse to Register a Request for Arbitration under the ICSID Convention', *ICSID Review*, vol. 27, No. 1 (2012), p. 172–191, available from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2045645, (accessed on July 18, 2017).
[68] See, for instance: D. Caron, 'ICSID in the Twenty-First Century: An Interview with Meg Kinnear: Introductory Remarks, 104Am', Society of International Law 413, 2010, available at http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1016&context=facpubs, (accessed on 31 August, 2017), p. 420. [hereinafter: "Caron, An Interview with Meg Kinnear"]. Meg Kinnear stated " And there may be lots of cases that aren't winners, but they're not manifestly without jurisdiction. So instead of getting too far involved in the case, we've said, "Satisfy yourself that it's not manifestly outside the jurisdiction, and if that's the case, then we go to the next stage.", which goes to show the limited powers or involvement of the Secretary-General in the screening process.

and second, this is an administrative and not a judicial function.[69] Thus, this benefit is, to a large extent, theoretical, and should not be overstated.

B. Tribunals have adopted a two-fold approach to defining jurisdiction under the ICSID. They first examine whether the investor and/or investment meet(s) the criterion under the BIT, and then examine whether the investor fulfils the conditions of Article 25 of the Convention. [70] The ICSID Convention does not define the term 'investment', and this is limited to the definition in the subject BIT or other relevant legal instrument. [71] Some Tribunals have read into Article 25 of the Convention a further threshold which *investments* must meet, giving the Convention supremacy over BITs. [72] This test is referred to as the *double-barrelled test,* and apparently it limits the jurisdictional scope of ICSID Tribunals *vis-à-vis* other avenues, such as UNCITRAL and ICC.[73] This is beneficial for Country X since it limits the types of cases which ICSID Tribunals can decide on merit.

[69] For further explanation see: S.D. Sutton, 'Emilio Augustin Maffezini v. Kingdom of Spain and the ICSID Secretary- General's Screening Power', *Arbitration International,* Vol. 21, No. 1 (2005), p. 121-123, available from https://doi.org/10.1093/arbitration/21.1.113, (accessed on August 24, 2017). Also see: *American Manufacturing & Trading, Inc. v. Republic of Zaire* (ICSID Case No. ARB/93/1), Award, American Manufacturing & Trading, Inc. v. Republic of Zaire (ICSID Case No. ARB/93/1), *American Manufacturing & Trading, Inc. v. Republic of Zaire* (ICSID Case No. ARB/93/1), Award, February 21, 1997, para. 5.01, where the Tribunal stated "Nevertheless, this fact does not prevent the Tribunal from examining the competence of ICSID because, evidently, Article 36(3) does not confer *upon* the Secretary-General of ICSID, responsible for the registration of Request, notably as concerns verification of the competence of the Centre, the task other than a mere obligation of an extremely light control which in the execution does not in any sense bind the Tribunal in any way in the latter's appreciation of its own competence or lack thereof."

[70] J. Harb,'Definition of Investments Protected By International Treaties: An On-Going Hot Debate' (A Commentary), *Mealey's International Arbitration Report*. Vol 26, No. 8, August 2011, p.13. (Citing: *Malaysian Historical Salvors Sdn, Bhd v. Malaysia*, ICSID Case No. ARB/05/10, Award, May 28, 2007, Para 55), available fromhttp://www.jonesday.com/files/Publication/c24e6d62-3269-4b32-b93d-992f1d5e2e77/Presentation/PublicationAttachment/b4526438-d73b-4bd4-a780-8003fe19feaf/689472.pdf (accessed on July 18, 2017).

[71] It is important to note that despite the uproar against ICSID from some Members and Non-Governmental Organizations to the effect that the Centre prescribes rules for states and takes away regulatory power from states, the ICSID Convention, while providing procedural rules on dispute settlement, 'carefully omit[ed] any explicit provision going to the substance of the obligations running between host states and foreign investors'. See: Puig, Emergence & Dynamism p. 543.

[72] See *Patrick Mitchell v. Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006, para. 31; *Phoenix Action, Ltd v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 96.

[73] M. Malik, 'Definition of Investment in International Investment Agreements', *International Institute for Sustainable Development*, Bulletin #1, August 2009, available at http://www.iisd.org/pdf/2009/best_practices_bulletin_1.pdf, (accessed on June 20, 2017), p. 5.

However, recent decisions such as *Biwater v. Tanzania* have distanced themselves from the *double-barrelled* test, on the basis that the drafters of the ICSID Convention did not define the term 'investment'. Notably, the Tribunal in the Tanzanian case stated: "*Given that the Convention was not drafted with a strict, objective, definition of "investment," it is doubtful that arbitral tribunals sitting in individual cases should impose one such definition which would be applicable in all cases and for all purposes*".[74] In *Gea Group Aktiengesellschaft v. Ukraine*, the Tribunal stated that "…with respect to the Conversion Contract and the Products, the Claimant made an "investment" in Ukraine, both within the meaning of Articles 1(1)(e) and 1(1)(a) of the BIT and (*if needed*) Article 25 of the ICSID Convention".[75] While this Tribunal referred to the *double-barrelled* test in its award, it raised the question of whether this test was necessary in establishing jurisdiction under the Convention. ICSID Tribunals are increasingly giving deference to parties' agreements as reflected in the subject investment agreements.[76]

C. Finally, the Convention excludes dual-nationals from claiming against their home State.[77] This provision is in direct contrast with a piece of legislation of Country X, which defines foreign investors to *include* citizens of Country X permanently residing abroad and who prefer to be treated as foreigners. Ratification of the ICSID Convention would mean that, should a claim be brought by a citizen of Country X claiming protection under international law by virtue of domestic legislation, Country X could successfully dispute jurisdiction of the Tribunal. Under

[74] *Biwater Gauff (Tanzania) Ltd v. Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, paras. 312 – 316.
[75] *Gea Group Aktiengesellschaft v. Ukraine*, ICSID CASE NO. ARB/08/16, Award, 31 March 2011, para. 153. (emphasis added). Also see *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Decision Jurisdiction, 8 March 2010, para. 129, which stated that "…this Tribunal is not persuaded that it is appropriate to impose such a mandatory definition through case law where the Contracting States to the ICSID Convention chose not to specify one."
[76] For detailed discussion see: J. Fellenbaum, 'GEA v. Ukraine and the Battle of Treaty Interpretation Principles Over the Salini Test', *Arbitration International*, Vol. 27, No. 2 (2011), p. 249-266, available at https://academic.oup.com/arbitration/article/27/2/249/223083/GEA-v-Ukraine-and-the-Battle-of-Treaty?searchresult=1 (accessed on August 25, 2017).
[77] *Champion Trading Company and Ameritrade International, Inc. v. Arab Republic of Egypt*, Decision on Jurisdiction dated 21 October 2003 (ICSID Case No. ARB/02/9).

other arbitral *fora* (and domestic courts), there is no such limitation. UNCITRAL Tribunals, for example, have allowed dual-nationals to bring claims under BITs, without enquiring into their effective nationality, as long as the subject BIT does not exclude dual-nationals from benefiting from its ISDS system.[78] However, where a BIT provides a hierarchy of ISDS with ICSID at the top, such investors could be barred from pursuing other *fora*.

In sum, while the three tenets discussed herein may limit ICSID claims against Country X, each of them has significant shortcomings, and therefore may not in themselves be reason enough to ratify the Convention.

5.1.3.4 Duration of arbitration proceedings and rules relating to timing

Table 2 shows the average length of proceedings (excluding annulment) by institution: 3 years and 6 months for the ICSID;[79] 3 years and 10 months under UNCITRAL rules;[80] between 6 and 12 months for the ICC;[81] and 13 months for the SCC.[82] Clearly, the ICSID is not the quickest channel for Country X. However, given that (a) complete information is not available for all the relevant arbitrational institutions analysed here; (b) some of the available data includes both investment and commercial arbitration;[83] and (c) specific factors might differentiate one proceeding to another (such as the complexity of the case at stake, recourse to procedural mechanisms, suspensions of

[78] C. Trevino, 'Treaty Claims by Dual Nationals: A New Frontier?' [web blog] October 8, 2015, http://kluwerarbitrationblog.com/2015/10/08/treaty-claims-by-dual-nationals-a-new-frontier/, (accessed 31 July, 2017).
[79] See A. Sinclair, 'ICSID Arbitration: how long does it take?', *Global Arbitration Review*, [webpage], 2009, http://globalarbitrationreview.com/article/1028686/icsid-arbitration-how-long-does-it-take, (accessed July 14, 2017).
[80] J. Commission, 'How Long is Too Long to Wait for an Award?' [web blog], http://vannin.com/press/pdfs/18-2-16_How_long_is_too_long_to_wait_for_an_award_.pdf (Accessed July 15, 2017) . [hereinafter: "Commission, How Long is Too Long"]
[81] Commission, How Long is Too Long. It has to be noted that such data include both investment and commercial arbitration; there is no information regarding the duration of investment disputes only.
[82] Baker Mckenzie, 'What are the Cost and Duration of Arbitration?', [webpage], 2017, http://www.bakermckenzie.com/en/insight/publications/2016/12/costs-and-duration-of-arbitration/ (accessed September 1, 2017).
[83] Commission, How Long is Too Long.

proceedings, dissents to the final award etc.), the duration of proceeding does not play a substantial role in assessing the benefits of the ICSID.[84]

What *is* a clear benefit, is ICSID Arbitration Rule 26, which allows a party to request for a time extension when it cannot comply with the time constraint established.[85] In the past, Tribunals have generally granted time extensions where requests were well grounded;[86] such extensions are usually the same amount of time for both parties.[87] This possibility would be beneficial for Country X since such an option is not available under the other arbitration avenues.

In conclusion, while ICSID proceedings would probably not be the quickest arbitration avenue for Country X, the fact that Country X could request for time extensions presents an advantage.

5.1.3.5 Competence, Impartiality and Neutrality

Despite the ICSID being touted as a neutral forum, there have been concerns over the neutrality of appointed arbitrators. Tribunals have been dominated by a select-few,[88] with one Member being appointed seventy-seven times.[89] Notably, repeat-appointments are made by investors or States, as certain arbitrators are known to have either pro-investor or pro-state inclinations.

Membership to the ICSID would give Country X the right to designate four persons to a list of Arbitrators (maintained by the ICSID) from which panels are ideally selected.[90] This is a perceived advantage, in that ICSID arbitrators are predominantly State-selected, and are therefore considerate to the points of view of States. However, this position does not hold water because none of the arbitrators may be nationals of either the host Country or the investor's

[84] *Ibid.*
[85] Rule 26, ICSID Rules of Procedure for Arbitration Proceedings. [Hereinafter: "ICSID Arbitration Rules"].
[86] Schreuer, The ICSID Convention: A Commentary, p 669.
[87] See for instance, *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, Decision on Jurisdiction, 2 June 2004, paras. 12, 13.
[88] Puig, Recasting ICSID's Legitimacy Debate, p.17 (Citing: J.W. Yackee, 'Pacta Sunt Servanda and State Promises to Foreign Investors before Bilateral Investment Treaties: Myth and Reality', *Fordham International Law Journal*, vol. 32, 2008, p. 1610–11).
[89] UNCTAD, Investment Policy Hub, 2017, http://investmentpolicyhub.unctad.org/ISDS/FilterByArbitrators, (accessed on August 3, 2017).
[90] Articles 13 and 40, ICSID Convention.

nationality.[91] In any case, it would be in Country X's interest to appoint arbitrators who share their ideological positions, nationality notwithstanding. Each party to the dispute appoints one arbitrator from the list mentioned above, while the third arbitrator (who also serves as the Tribunal Chair) is appointed by agreement of the parties,[92] or by the President of the World Bank in case of disagreement between the parties.[93] The Tribunal Members, except for the Chair, may be selected from outside the list of arbitrators.[94]

Appointment of the Tribunal Chair under ICSID is substantially similar to the process under ICC Rules[95] and SCC Rules,[96] in that the Chair is selected by the Court and Board respectively. Under UNCITRAL Rules,[97] the party-appointed arbitrators jointly select the Chair. The significant difference between these *fora* and the ICSID is that the Chair of an ICSID Tribunal ought to be selected from the list of arbitrators maintained by the Secretariat, while the SCC, ICC and UNCITRAL do not maintain such list. However, in practice, ICSID chairs are increasingly being appointed from *outside* the list of arbitrators with consent of the parties.[98] Under ICSID-AFR, at the first instance the Chair is appointed by agreement of the parties, failing which the Secretary-General calls upon each party to nominate a person and the other to concur. Thus under the ICSID and the ICSID-AFR, States have a say, albeit very weak, in selection of Tribunal Chairs.

Further, concerns of 'double-hatting'[99] and 'revolving door'[100] continue to plague the ISDS system across all *fora*.[101] Currently, the ICSID Convention

[91] Article 39, ICSID Convention and Rule 3(1) of the ICSID Arbitration Rules. The exception to this rule applies to sole arbitrators, who may be of one of the parties' nationality as long as the parties agree.
[92] Article 37, ICSID Convention.
[93] While Article 38 of the ICSID Convention provides that the Chairman of the Administrative Council shall appoint the Tribunal Chair in case of disagreement between the parties, Article 5 provides that the President of the World Bank is the *ex officio* Chairman of the Administrative Council. The appointments are now done by the Secretary-General of the ICSID on behalf of the Chairman.
[94] Article 40, ICSID Convention.
[95] Article 12(5), International Chamber of Commerce Rules of Arbitration.
[96] Article 17(4), Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce.
[97] Article 9(1), United Nations Commission on International Trade Law, Arbitration Rules (as revised in 2010).
[98] Caron, An Interview with Meg Kinnear, p. 422.
[99] Double-hatting refers to situations in which an individual acts as arbitrator in one case and simultaneously takes up another role in another case. See: D. Behn, M. Langford and R. Hilleren Lie, 'The Revolving Door in International Investment Arbitration'. Journal of International Economic Law, Vol 20, Issue 2, 2017, 1–28, p. 1, available at https://oup.silverchair-

does not include 'bias' as a ground for annulment.[102] The ICSID Secretariat has commenced efforts to modernize its rules.[103] One of the identified agenda items is (dis)qualification of arbitrators, in addition to formulation of rules of conduct for arbitrators. Ratification of the Convention would enable Country X to contribute to this discussion, and to shape rules that would make it easier for Country X to challenge appointment of arbitrators with an apparent bias.

The Convention and the other arbitral avenues have common rules on the appointment of arbitrators. [104] All of them contain provisions on the qualifications of arbitrators, which incorporate explicit requirements of independence and impartiality; they all require arbitrators to disclose circumstances that would prevent them from being impartial or independent; they all establish rules on the conduct arbitrators must maintain throughout the duration of the proceedings; and they all set standards and procedures for parties to challenge arbitrators due to lack of independence or impartiality.[105] Even though they are phrased differently, rules of the various venues seem to be very similar in scope – they all essentially aim for targeting independence

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cdn.com/oup/backfile/Content_public/Journal/jiel/PAP/10.1093_jiel_jgx018/1/jgx018.pdf?, (accessed July 20, 2017). [hereinafter: Behn et al, Revolving Door).

[100] This is where single individuals act as counsel, arbitrators and experts in various disputes. *Ibid*.

[101] The whole investor-state dispute settlement regime has been suffering from some general problems, such as the subordination of public interest to commercial one, conflict of interest, lack of transparency and the fact that developing countries are unrepresented among the panels of arbitrators.

[102] Article 52, ICSID Convention.

[103] Word Bank, https://icsid.worldbank.org/en/Pages/resources/ICSID%20NewsLetter/2017-Issue2/Update-on-ICSID-Rule-Amendment-Project.aspx (2017), (accessed on August 17, 2017).

[104] The assessment of the precise rules on the procedures and methods of appointment of arbitrators in each system falls outside the scope of this memorial. In case you would like to have more information on such matter, see generally: A. Reinisch, A Sinclair, C. Schreuer and L. Malintoppi, *The ICSID Convention: a Commentary*, 2nd ed., Cambridge University Press, 2010; Thomas Webster, *Handbook of UNCITRAL Arbitration: Commentary, Precedents and Models for UNCITRAL Based Arbitration Rules*, Sweet & Maxwell Ltd, London 2010; Michael Buhler et al. *Handbook of ICC Arbitration. Commentary, Precedents, Materials*, 2nd Edition Sweet & Maxwell, 2008; D. Caron, L. Caplan and M. Pellonpää, *The UNCITRAL Arbitration rules: a commentary*, OUP, Oxford, 2006; Larisa Babiy, Adam Czewoja Sheikh, Blerina Xheraj, 'Should Mexico Join ICSID?', CTEI Working Papers, 2012 [Hereinafter: "Sheikh et al, Should Mexico Join ICSID"], p. 30-33.

[105] L. Johnson, F. Marshall and N. Bernasconi-Osterwalder, 'Arbitrator Independence and Impartiality: Examining the dual role of arbitrator and counsel', IV Annual Forum for Developing Country Investment Negotiators, 2010, p. 6.

and impartibility of arbitrators;[106] the same thing is true for standards of disclosure.[107]

In sum, the ICSID, as it stands, is not superior to other *fora* in respect of impartiality and independence of arbitrators.

5.1.3.6 Transparency

While international arbitration as a whole is widely preferred over domestic litigation due to the confidential nature of proceedings, confidentiality in investor-state arbitration has not received the same kind of generosity[108] – and justifiably so, as such disputes involve public interests.[109] Unlike other *fora* of investor-state dispute settlement, the Centre publishes arbitral awards with consent of the parties, or at least excerpts of the same when such consent is withheld.[110] The ICSID Arbitration Rules also allow for non-disputing parties to attend proceedings and file submissions, which make the Centre more transparent.[111]

These transparency provisions would be advantageous for Country X because States owe social accountability to their constituencies, and transparency waters down domestic opposition to ISDS. On the flipside, such transparency would expose Country X to domestic pressure, should the constituencies perceive arbitral proceedings to shift the law making regime from elected legislators to foreign arbitrators.

[106] B. Lauterburg and N. Rubins , 'Independence, Impartiality and Duty of Disclosure in Investment Arbitration', p. 158, in: C. Knahr, C. Koller, W. Rechberger and A. Reinisch, Eds., Investment and Commercial Arbitration-Similarities and Divergences, Eleven International Publishing, The Netherlands, 2010. [hereinafter: "Lauterburg and Rubins, Independence, Impartiality and Duty of Disclosure"]
[107] Lauterburg and Rubins, Independence, Impartiality and Duty of Disclosure, p. 159.
[108] For example, see: C. Provost and M. Kennard, 'The obscure legal system that lets corporations sue countries'. The Guardian, published June 10, 2015. (Accessed online at: https://www.theguardian.com/business/2015/jun/10/obscure-legal-system-lets-corportations-sue-states-ttip-icsid, on July 18, 2017).
[109] See the distinction made by the US Government "[investor-state disputes are] to be distinguished from a typical commercial arbitration on the basis that a State [is] the Respondent, the issues [have] to be decided in accordance with a treaty and the principles of public international law and a decision on the dispute could have a significant effect extending beyond the two Disputing Parties." quoted in N. Blackaby, 'Investment Arbitration and Commercial Arbitration (or the Tale of the Dolphin and the Shark)' in Loukas Mistelis and Julian Lew (eds), *Pervasive Problems in International Arbitration* (Kluwer 2006) 218.
[110] Rule 48(4), ICSID Arbitration Rules.
[111] Rule 38, ICSID Arbitration Rules.

The United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (the Mauritius Convention on Transparency) entered into force in October 2017. This Convention applies to any investor-State arbitration, whether or not initiated under the UNCITRAL Arbitration Rules, in which either the respondent country or the claimant's home country is a party that has not made a relevant reservation.[112] This Convention now allows for, *inter alia*: publication of documents such as written submissions; filing of third party submissions; and open hearings.

The Mauritius Convention dwarfs transparency provisions under the ICSID. However, noting that Country X is not a signatory to the Mauritius Convention on Transparency,[113] this Convention would not, at least in the meantime, apply to disputes in which Country X would be involved.

5.1.3.7 Finality of Awards

While the ICSID system may provide several advantages to investors in dispute resolution, ultimately it is the enforcement of an award that gives credence to the whole process.[114] This part of the report discusses the recognition of awards and the annulment procedure under ICSID (*vis-á-vis* other *fora*), after which it conducts the same discussion for enforcement of awards. In this part, the ICSID-AFR is included in other *fora*, as the ICSID rules on annulment and enforcement do not apply to the ICSID-AFR.[115]

To be clear, while the following discussion evaluates whether the ICSID is preferable for investors due to its enforcement mechanism, it is difficult to assess in the abstract whether or not this forum is better for Country X. This is because States may renege on the arbitral award. This discussion therefore proceeds under the assumption that Country X is neutral as to what ISDS forum investors perceive to be beneficial for them.

[112] Article 2.1, The Mauritius Convention on Transparency.
[113] The United Nations Treaty Collection, 2017 https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XXII-3&chapter=22&lang=en, (accessed 26 August, 2017).
[114] L.A. Mistelis, 'Award as an Investment: The Value of an Arbitral Award or the Cost of Non-Enforcement', *ICSID Review*, Vol. 28, No. 1 (2013), pp. 64–87. P. 68, available from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2195016, (accessed on July 12, 2017). [hereinafter: "Mistelis, Awards as Investments"]
[115] Article 3, ICSID-AFR.

5.1.3.7.1 Recognition and Annulment of Award

Article 53 of the ICSID Convention provides that its arbitral awards are binding and not subject to remedies other than those provided under the Convention. The implication is that ICSID awards are buffered from external review which would take place under the domestic laws of the seat of arbitration (which may not be consistent with the host country's policies).[116] Investors are more likely to choose countries which are Members of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), as the seat of arbitration. Several of the BITs signed by Country X explicitly provide that arbitration shall be held in countries which are Members of the New York Convention. Therefore, if Country X is a Member of the ICSID Convention, it may be chosen as the seat of arbitration. In the alternative, it is excluded.

The ICSID system, on the other hand, is self-contained, in that the Convention provides for internal mechanisms for annulment of its awards. The Convention requires that upon a request for annulment, the Chairman of the Administrative Council constitutes an *ad hoc* annulment committee from the list of arbitrators, none of whom shall have served in the initial panel proceedings. Article 52 of the ICSID Convention provides for limited grounds upon which arbitral awards may be annulled, *inter alia*: that the Tribunal was not properly constituted; that there was a serious departure from a fundamental rule of procedure; or that the award failed to state the reasons upon which it was based. Notably, public policy is not a ground upon which annulment may be sought under the ICSID Convention, unlike avenues such as UNCITRAL[117] where this is possible. Public policy may be an important focal point for Country X, as some of its reforms made in public interest may attract investment claims.[118]

[116] VDB Loi, -Should Myanmar Join the International Convention for the Settlement of Investment-, available at http://www.vdb-loi.com/wp-content/uploads/2017/04/Should-Myanmar-Join-the-International-Convention-for-the-Settlement-of-Investment-Disputes.pdf, (accessed on July 12, 2017). [hereinafter "Kyaw et al, Myanmar"]

[117] Article 34(2)(b)(ii), United Nations UNCITRAL Model Law on International Commercial Arbitration, 1985 (With amendments as adopted in 2006). This Model Law is applied in investment arbitration as well.

Despite the narrow grounds provided under the Convention, annulment committees have been criticized for blurring these grounds and creating an appellate mechanism.[119] In *Vivendi V. Argentina*, for example, the annulment committee stated that "Article 52 does not introduce an appeal facility but only a facility meant to uphold and strengthen the integrity of the ICSID process… Article 52(1)(e) is *cast more in terms similar to an ordinary appeal*."[120]

This apparent expansion of mandate by annulment committees, it has been argued, impedes finality of ICSID awards, compared to other *fora*.[121] However, it is potentially advantageous for the State since it allows for a kind of appellate mechanism, unavailable under other *fora*. In any case, as awards from other *fora* would be subject to annulment in domestic *fora*, depending on the domestic laws of the jurisdiction in which annulment is sought, such challenge may be escalated up to the appellate mechanisms, further impeding finality under other ISDS *fora*.

Some have downplayed this advantage accrued under the ICSID annulment procedure, by arguing that the same would be obtained from investor-friendly jurisdictions such as Swiss, English, German or Austrian domestic law.[122] However, this argument oversimplifies the issue by not taking into account other countries in which arbitration may be conducted, which may not have such arbitration-friendly legal systems.

In sum, the ICSID Convention would be better for Country X with respect to annulment since the grounds for annulment are codified in the Treaty, and are thus predictable and not dependent on domestic courts and laws of other jurisdictions. ICSID also allows Country X two bites of the apple through the *de facto* appellate mechanism.

[119] It has been noted that the *ad hoc* committee in *Klockner v. Cameroon* (Decision of the Ad Hoc Committee, 1 ICSID Rev.—Foreign Inv. L. J. 89 (1986)) "substituted [with] its own 'correct' interpretation and...judge[d] the quality of reasoning of the tribunal". A. Broches, 'Selected Essays: World Bank, ICSID, and other Subjects of Public and Private International Law', 79, 1995, 80-84, cited in S. Puig, Emergence & Dynamism, p. 556.
[120] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision on Annulment of the Award rendered on 20 August 2007, para. 247. (Emphasis added).
[121] S. Puig, Emergence & Dynamism, p. 588.
[122] Horn, UNCITRAL Arbitration Rules, p. 592.

5.1.3.7.2 Enforcement of Arbitral Awards

Article 54 obliges Contracting States to recognize ICSID awards as binding and to enforce pecuniary obligations. The theoretical implication is that investors in whose favour pecuniary awards are made may enforce them in any ICSID Member.

Although the Convention provides for recognition of awards, it leaves enforcement of awards to the domestic courts of the jurisdiction in which enforcement is sought.[123]

Therefore, an investor who obtains an ICSID award against Country X would have the right to present it to a competent court of any other ICSID Member. The courts of that country would then be obligated to recognize the award as final, and ought not to set it aside. However, domestic laws on enforcement would apply, and recognition of sovereign immunity would not be affected by the fact that the award is issued by an ICSID Tribunal.[124] Therefore, investors who obtain awards under the ICSID cannot execute them against sovereign property owned by Country X abroad.[125]

The New York Convention obliges Members to "…recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon…"[126] Article VII provides that the New York Convention does not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into, hence its provisions would not affect the enforcement provisions under the ICSID Convention. An investor seeking to enforce an award obtained from any other ISDS forum would be required to present the subject arbitration agreement along with a duly authenticated original award or a certified copy thereof to the domestic court of any of Member of the New York Convention. [127] Importantly, the award must have been obtained from a

[123]Article 54(3), ICSID Convention.
[124] Article 55, ICSID Convention.
[125] For further discussion see A. Alexandroff and I. Laird, 'Compliance and Enforcement', in Muchlinski, P., Ortino, F., Schreuer, C., [Eds.], The Oxford Handbook of International Investment Law, Oxford University Press (2008) 1171-1187.
[126] Article III, New York Convention.
[127] Articles II and VI, New York Convention.

tribunal sitting on the jurisdiction of a Member of the New York Convention. Further, under the New York Convention, a domestic court may refuse recognition on public policy grounds,[128] a factor not recognized under the ICSID Convention.

In sum, reiterating that it is the enforceability of awards that gives credence to the entire arbitration process, ratification to the ICSID Convention would boost investor confidence in Country X. That said, the regard given by investors to enforcement of arbitral awards while selecting the forum for arbitration is not very clear. Statistics show that awards are generally voluntarily complied with, and are subject to minimal domestic interference.[129] When States refuse to recognize and enforce awards, little can be done under the two Conventions discussed herein to compel States to do so. Recently, Argentina delayed payment of investors' awards, forcing them to comply with local procedures followed by creditors of final local judgments.[130] In the event that Country X cannot (or does not want to) pay, the ICSID cannot, beyond restating the requirement of the Convention, force compliance with such awards.[131]

5.1.3.8 Conclusion

Currently, the ICSID is the only forum which deals exclusively with ISDS. It therefore provides mechanisms which are sensitive to the public nature of investor-state disputes, such as in respect of transparency and appointment of arbitrators. Further, unlike other ISDS *fora*, it receives subsidisation from the World Bank, hence it is not a profit-oriented facility.[132] However, as discussed above, the substantial difference is in respect of recognition and enforcement of awards, in which case the ICSID appears to be more attractive to investors as compared to other *fora*.

[128] Article V (2) (b), New York Convention.
[129] School of International Arbitration, Queen Mary University of London and PricewaterhouseCoopers LLP, '2008 International Arbitration Study-Corporate Attitudes and Practices: Recognition and Enforcement of Foreign Awards', 2008, cited in L. Mistelis, 'Awards as Investments', p. 71.
[130] Puig, Emergence & Dynamism, p. 590.
[131] Caron, An Interview with Meg Kinnear, p. 426.
[132] Puig, Emergence & Dynamism, p. 549.

5.2. Possible Costs

5.2.1. Loss of Regulatory Autonomy or the problem of “regulatory chill”

Before analyzing individual costs of the ICSID membership, it is beneficial to briefly look at a more "general" critique of international law (i.e. one not restricted to investment): the problem of "loss of regulatory autonomy".

"Regulatory autonomy" refers to a 'sovereign' State's freedom to regulate matters as it sees fit, often in furtherance of public policy.[133] International law places fetters on this ability of States in two ways: first, through rules contained in treaties which allow for, or prohibit, certain behaviour; and second, through dispute resolution, in case a rule is deemed to be violated.

"Regulatory chill" is a situation where a State, for fear of international litigation (often very expensive), is unable to regulate its affairs freely, considering that: (a) such decisions are largely out of the State's control, and (b) most of these decisions (in case of a loss) carry large financial burdens. Commentators have analysed investment disputes that have spread the fear of regulatory chill, and made some preliminary conclusions.[134] It is not the ISDS system as such (for *all* international agreements limit regulatory autonomy), but the *way* in which substantive investment obligations are interpreted, that reduces Governmental policy space. As such, there is nothing to show that the ICSID Convention (or any other investment agreement for that matter) promotes such a restrictive interpretation.[135]

5.2.2. Compensation and Settlement Amounts

A persistent cause of worry for many countries contemplating investment policy is the actual *cost* involved in dispute resolution. It is useful to reflect on the trends observable, for compensation and settlement amounts, under different arbitration regimes.

[133] See: J. G. Brown, 'International Investment Agreements: Regulatory chill in the Face of Litigious Heat?*', Western Journal of Legal Studies*, Vol. 3 Issue 1, 2013.See in general S. Besson, ‘Sovereignty, International Law and Democracy’, *European Journal of International Law,* Vol. 22 Issue 2, 2011.
[134] See fn 5 above.
[135] *Ibid.*

Table 1 presents a compilation of data on all publicly available disputes to date,[136] from which these conclusions can be drawn:

(a) The *maximum* amount of compensation awarded was under the UNCITRAL rules, but the highest settlement amount is found under the ICSID (though by a small margin);

(b) The *minimum* amount, for both award and settlement, is found under the ICSID;

(c) For compensation, on *average***,** the ICSID is cheaper than the ICSID-AFR and UNCITRAL;

(d) For settlements, UNCITRAL is cheaper;

(e) Only one ICC award could be identified (*De Sutter and others v. Madagascar*[137]), where the investor won 0.9 million USD.

In conclusion, compared to other avenues, the ICSID usually entails lesser (though sometimes marginally lesser) financial burden.

5.2.3. Possible Increase in Disputes

Non-Members of ICSID worry that ratification will increase the number of disputes brought by investors. Some research has spotted trends showing that investment claims instituted against a country increase ten years after ratification.[138] While these trends are correct as based on the available data, they are not conclusive for the following reasons.

First, access to arbitration under the ICSID Convention is limited to the consent to arbitrate provisions in the subject legal instruments. Therefore, as analysed below, investors may not file claims against Country X unless this channel is consented to in the legal instrument at hand. In any case, even with Country X not being a Member of the ICSID, investors have access to the system's institutions through the ICSID-AFR. As stated above, Article 2(a) of

[136] Amounts in million USD. Data collected using UNCTAD database, available at: http://investmentpolicyhub.unctad.org/ISDS

[137] *Kristof De Sutter, Peter De Sutter, DS 2 S.A. and Polo Garments Majunga S.A.R.L. v. Republic of Madagascar* (I), Award, August29, 2014.

[138] Sheikh et al, Should Mexico Join ICSID', p. 87, cited in Kyaw et al, Myanmar, p. 5.

the ICSID-AFR Rules allows for the use of the system where one of the countries (either the host State or the investor's home country) is a Member of the ICSID Convention. With the largest sources of Country X's capital being Members of the ICSID Convention,[139] these investors have access to the system.

Second, the two countries topping the list of respondent States before ICSID panels - Argentina and Venezuela – underwent turbulent economic and political periods which resulted in these disputes. The majority of the disputes against Argentina arose from the financial crisis at the close of the last century, while those against Venezuela arose from the nationalization program put in place by the Government. Spain, which comes close to Argentina and Venezuela in terms of number of disputes, put in place reforms in its renewable energy sector following the financial crisis. The crux of this is that ratification of the ICSID Convention does not in itself lead to an increase in disputes. These arise from Governmental measures which violate the subject BITs.

Third, all BITs signed by Country X provide for some form of ISDS clause. These clauses provide standing consent which is triggered upon notification of investment claims.

It is also important to note that Mexico, Russia and Poland, which are amongst the countries which have been named respondent most frequently, have never ratified the ICSID Convention, and yet claims have been lodged under other *fora* such as the ICSID-AFR and UNCITRAL. In addition, Canada, which is also one of the most frequently sued, only ratified the Convention in 2013.[140] Even then, most of the disputes had been filed before its ratification, and of the five filed after ratification, three have been before *fora* other than the ICSID. Ecuador and Venezuela recently withdrew from the Convention. Further, claimants from countries which are Members of the ICSID may still claim from these countries under the ICSID-AFR, notwithstanding the

[139] [***].
[140] The ICSID Convention became effective in Canada on December 1, 2013. See: ICSID, Database of ICSID Member States, https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx, (accessed July 7, 2017).

withdrawal. In any case, while not dismissing the possibility, efficiency seeking investments (the type of investments Country X is trying to attract) hardly attract claims, as they are less prone to expropriation and other such acts (as compared to resource seeking investments).[141]

That said, it should be noted that the ease of enforcement of ICSID awards may encourage investors to claim against Country X for treaty or contractual breach. However, there is no way to ascertain whether this would result.

5.3. Options other than the ICSID

As final remark, it should be borne in mind that ratifying the ICSID Convention is not the sole option for Country X. Alternative options include the possibility of a bilateral treaty court (such as what is aimed by the Transatlantic Trade and Investment Partnership), a permanent regional court (such as one modelled after the Arab Court of Investment), or even a more ambitious option such as joining an emerging permanent multilateral court that would adjudicate disputes. We make no opinion, but we suggest exploring these options.

In particular, we believe that a bilateral or regional court may be a valuable solution if the critical mass can be reached and the participating countries are willing to bear the high costs of, arguably, a limited number of investment disputes.

A permanent investment court may be a better solution in the view of creating a multilateral investment system. The lack of a centralized system in investment law, that relies on over 3,000 investment treaties,[142] has caused not only the fragmentation in case-law but also great inconsistency and even incompatible decisions delivered in similar circumstances.[143] A permanent multilateral court would remedy this situation. Also, the fact of participating in

[141] See, for instance, ICSID, 'The ICSID Caseload- Statistics', Issue 2017-1, available at https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202017-1%20(English)%20Final.pdf, (accessed on September 12, 2017).
[142] See: UNCTAD, 'Non-equity Modes of International Production and Development', *World Investment Report*, 2011, p.100.
[143] D. Kim, 'The Annulment Committee's Role in Multiplying Inconsistency in ICSID Arbitration: The Need to Move Away from an Annulment-Based System', New York University Law Review, Volume 86, Number 1, April 2011, p. 246.

the negotiation and creation of a multilateral court would be very advantageous for Country X which, by being an international-rules maker, would have greater power to defend its interests and vision in the international investment arena. In this scenario, Country X would have a voice to mould rules from the ground-up according to its concerns; whereas the accession to the ICSID means that the Country would have to accept rules that are already shaped and set. On the other hand, the latter option is not likely to happen in the short-run, and may not happen even in the long-run.

In sum, a multilateral investment court would be a very valuable solution; however its creation is of great complexity and thus remains uncertain. A bilateral or regional court would surely be a more immediate solution; nonetheless it must be examined whether it would be a beneficial answer in the specific case of Country X, considering a number of factors such as its legal, political and economic system as well as the investment legal instruments it has concluded.[144]

Finally, we would like to outline that we are not implying that the aforementioned options are better (or worse) than the ICSID; we would simply like to remind Country X that these alternatives also exist and should be taken into consideration in the final decision on whether to ratify the Convention.

5.4. Conclusion on cost-benefit analysis

In conclusion, Country X may ratify the ICSID Convention without concerns of substantial increase in cases against the State as a result of the ratification, and would not have to bear any significant financial burden (i.e., membership fees or otherwise) as a direct result of ratification. Thanks to the recognition and enforcement of awards, that diminish the risk caused by FDI, the ICSID Membership may increase investors' confidence, as it would enable Country X to signal that it has embraced a system for enforcing FDI protections internationally.[145] However, Country X should not expect any hard benefits in

[144] Please note that however such analysis falls outside of the scope of this memorial.
[145] I. Vincentelli, 'The Uncertain Future of ICSID in Latin America', 2009, available at https://ssrn.com/abstract=1348016 or http://dx.doi.org/10.2139/ssrn.1348016, (accessed on August 31, 2017), p. 1. [hereinafter: "Vincentelli, Future of ICSID in Latin America"]

terms of increased FDI inflows, solely because of its Membership to the ICSID.

Good investment policy is more than the agreements a country signs or ratifies. Equally important are: domestic property rights, how well domestic institutions work, domestic infrastructure, workforce, the genuine intention of a Government to not interfere with foreign investment, etc. In this regard, the ICSID could be a valuable *complement* to good investment policy and should be accompanied of more robust measures that are necessary to improve investment and economic policy.

6. Comparison with "similarly situated countries" – Bangladesh and Kenya

6.1 Justification of the choice of comparators

This part of the report briefly looks at two countries, Kenya and Bangladesh, which are both Members of the ICSID.[146] Bangladesh and Kenya are both developing countries, just like Country X.[147]

As stated earlier in this report, Country X's priority is efficiency seeking investments.

Both Kenya and Bangladesh have been subject to investment disputes, and noting their interest in the same kind of investment as Country X, we analyse whether they have derived particular advantages from being Members of the ICSID.

6.2 Bangladesh

Bangladesh ratified the ICSID Convention in 1980.[148] As showed by Graph 1, FDI has been very discontinuous from such year to 2015. Further, there were strong critiques by investors and business persons because of the lack of

[146] ICSID, Database of ICSID Member States, https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx (accessed July 7, 2017). The Convention became effective in Bangladesh on April 26, 1980, and in Kenya on Feb 02, 1967.

[147] UNCTAD, UN List of Least developed countries, http://unctad.org/en/pages/aldc/Least%20Developed%20Countries/UN-list-of-Least-Developed-Countries.aspx, (accessed July 21, 2017).

[148] See: ICSID, [webpage], 2017, https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx (accessed: August 31, 2017).

domestic infrastructure, burdensome administrative procedures and disruptions in the provision of services to business. For these reasons, it is difficult to draw a correlation between Bangladesh's ratification of the ICSID Convention and its FDI inflows.

Bangladesh was respondent in three disputes before the ICSID.[149] In two of them the award was in favour of the investor, while in the other, the proceedings were discontinued.[150] Currently, the country is subject to two proceedings that are pending.[151] In one dispute, the *Saipem case*, Bangladesh challenged one of the arbitrators appointed on the ground of impartiality; however the Tribunal dismissed the claim.[152]

Bangladesh has attempted to disrupt arbitration proceedings in two instances. The first one was the *Saipem* case, which went to the ICC where Bangladesh resorted to local courts to deny the Court's jurisdiction, and then annul its award.[153] The case was later taken to the ICSID where Bangladesh, although grudgingly, was compelled to participate. In the *Chevron case*, Bangladesh unsuccessfully attempted to obtain an anti-suit injunction from local courts to dismiss the ICSID's jurisdiction.[154] In this instance, the ICSID appears to be more efficient than other avenues in keeping its legal system isolated from other interferences.

[149] *Scimitar Exploration Limited v. Bangladesh and Bangladesh Oil, Gas and Mineral Corporation* (ICSID Case No. ARB/92/2); *Saipem S.p.A. v. People's Republic of Bangladesh* (ICSID Case No. ARB/05/7); *Chevron Bangladesh Block Twelve, Ltd. and Chevron Bangladesh Blocks Thirteen and Fourteen, Ltd. v. People's Republic of Bangladesh* (ICSID Case No. ARB/06/10).

[150] See: ICSID, [webpage], 2017, https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx (accessed: July 14, 2017).

[151] *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited ("Bapex") and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla")* (ICSID Case No. ARB/10/11); *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration and Production Company Limited ("Bapex") and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla")* (ICSID Case No. ARB/10/18).

[152] See: C. H. Schreuer et al., The ICSID: A Commentary. According to Bangladesh, the arbitrator had expressed opinions in his writings that "preconceived positions with regard to some of the central issues of the arbitration". However, the Tribunal dismissed the claim and prescribed that the arbitrator acted consistently with Article 14(1) of the ICSID Convention.

[153] See: *Saipem S.p.A.* v. *People's Republic of Bangladesh,* ICSID Case No ARB/05/7.

[154] *Chevron Bangladesh Block Twelve, Ltd. and Chevron Bangladesh Blocks Thirteen and Fourteen, Ltd.* v. *People's Republic of Bangladesh* (ICSID Case No. ARB/06/10). The ICSID tribunal referred to Articles 26 and 41 of the Convention, and declared itself to have jurisdiction.

6.3 Kenya

Kenya ratified the Convention in 1967.[155] From 1970 to 2011, FDI flows were very erratic as demonstrated in Graph 2. Recently, FDI projects in Kenya have increased due to reforms in the domestic law aimed at easing investments, in addition to the Government's efforts in the renewable energy industry.[156] Due to these reasons, it is thus difficult to draw a correlation between Kenya's ratification of the ICSID Convention and its FDI inflows.

Kenya has been a respondent in one case before the ICSID, in which it successfully defended itself against the claim.[157] A review of the proceedings shows that Kenya did not use "non-legal" means to disrupt the arbitration. However it is impossible to say whether this was *because of* the Convention's requirement of depoliticization. Currently, Kenya is subject to two disputes.[158] Out of the three cases, two were brought by British nationals,[159] while the third was brought by Canadian and American citizens. Of importance is that the BIT between the United Kingdom and Kenya only provides for ISDS through the ICSID.[160] At this point, it is not possible to deduce the ISDS options contained in the contract under which the third case[161] was brought, as the same is not publicly available (yet Kenya does not have a BIT with either Canada or the United States). It is therefore difficult to ascertain whether the foreign investors would have opted for the ICSID if they had other options. So far, Kenya has not challenged any of the arbitrators appointed in the three disputes on grounds of impartiality.

[155] See: ICSID, [webpage], 2017, https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx (accessed: August 31, 2017).
[156] Invest in Group, Kenya FDI Landscape, http://investingroup.org/snapshot/268/kenya-fdi-landscape-kenya/, 2017, (accessed on August 29, 2017).
[157] *World Duty Free Company Limited v. The Republic of Kenya*, ICSID Case No. ARB/00/7, award, October 4, 2006.
[158] *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. The Republic of Kenya*, ICSID Case No. ARB/15/29 and *WalAm Energy Inc. v. The Republic of Kenya*, ICSID Case No. ARB/15/7.
[159] *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. The Republic of Kenya*, ICSID Case No. ARB/15/29 and *World Duty Free Company Limited v. The Republic of Kenya*, ICSID Case No. ARB/00/7, award, October 4, 2006.
[160] Article 9, Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Kenya for the Promotion and Protection of Investments, concluded at Nairobi, September 13, 1999.
[161] *WalAm Energy Inc. v. The Republic of Kenya*, ICSID Case No. ARB/15/7.

6.4 Conclusion

Therefore, the analysis conducted for Bangladesh and Kenya shows that while the ICSID might be a positive signal that increases investor confidence, it is difficult to assess the real benefits that accrue from ratifying it.

7. Final Conclusion

In summary, this report started by briefly setting out the legal, economic and political situation in Country X, which informed the rest of this analysis. The discussion on ratification of the Convention demonstrated that, in principle, ICSID's requirements concerning ratification are light. Further, this report discussed the different ways in which Country X has given or will give consent to arbitration under the ICSID, in addition to limitations thereof. The larger part of this report discusses the costs and benefits of ratification of the ICSID Convention with particular focus on specialization to ISDS. This aspect sets aside the ICSID from the rest of the ISDS *fora*, particularly due to its enforcement provisions. This fosters, or is perceived to foster investors' confidence, while providing an avenue that is responsive to the needs of States as compared to other *fora*, which were essentially created for commercial arbitration. Finally, this report has conducted a brief comparison with the situation in Bangladesh and Kenya, which are similarly situated countries, and confirmed that while Membership to the ICSID may signal that Country X is investor-friendly, it is difficult to measure the real gains that result.

That said, the long and short of it is that Country X would be better placed ratifying the ICSID Convention than otherwise.

Table 1

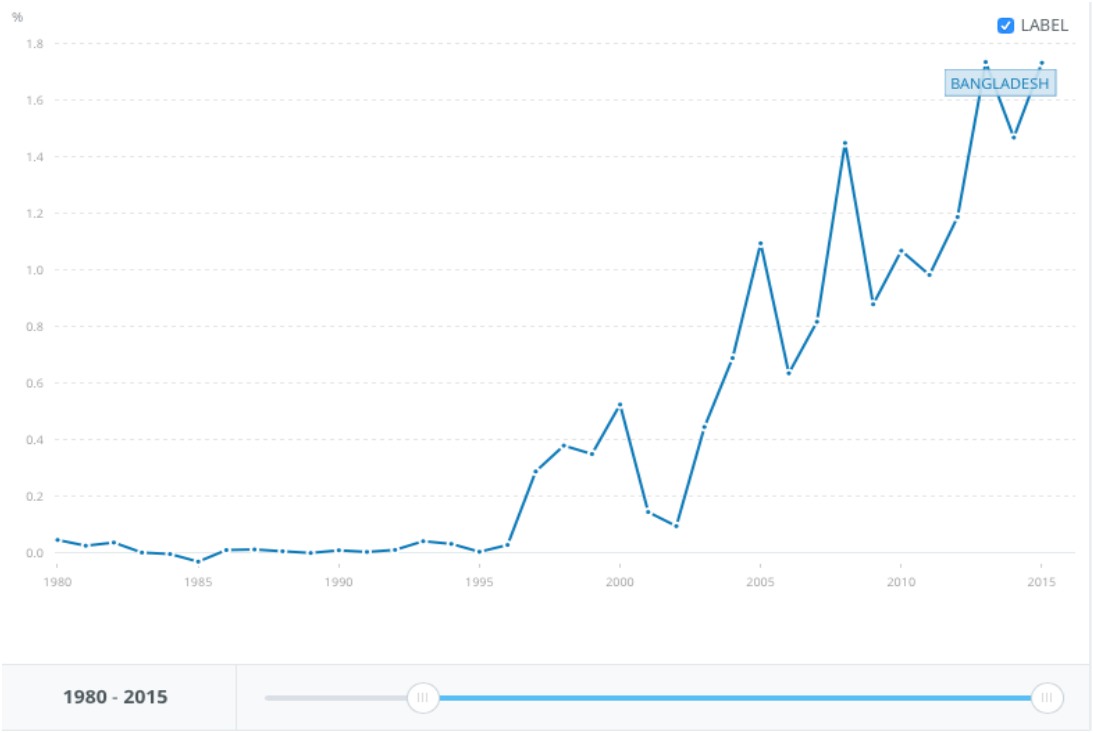
	ICSID	ICSID AFR	UNITRAL
Maximum Compensation	1769 (Occidental v. Ecuador)	1202 (Crystallex v. Venezuela)	40000 (Hulley Enterprises v. Russia)
Minimum Compensation	0.15 (Mafezzini v. Spain)	0.74 (Feldman v. Mexico)	0.46 (Pope & Talbot v. Canada)
Average Compensation	118.177 (approx.; 65 awards)	224.86(approx.; 14 awards)	1475.590 (approx.; 35 awards)
Maximum Settlement Amount	5000 (Repsol v. Argentina)	N/A	4379 (Eureko v. Poland)
Minimum Settlement Amount	3 (Goetz v. Burundi (I))	N/A	13 (Ethyl v. Canada)
Average Settlement Amount	578.70 (19 cases)	N/A	385.60 (14 cases)

Table 2

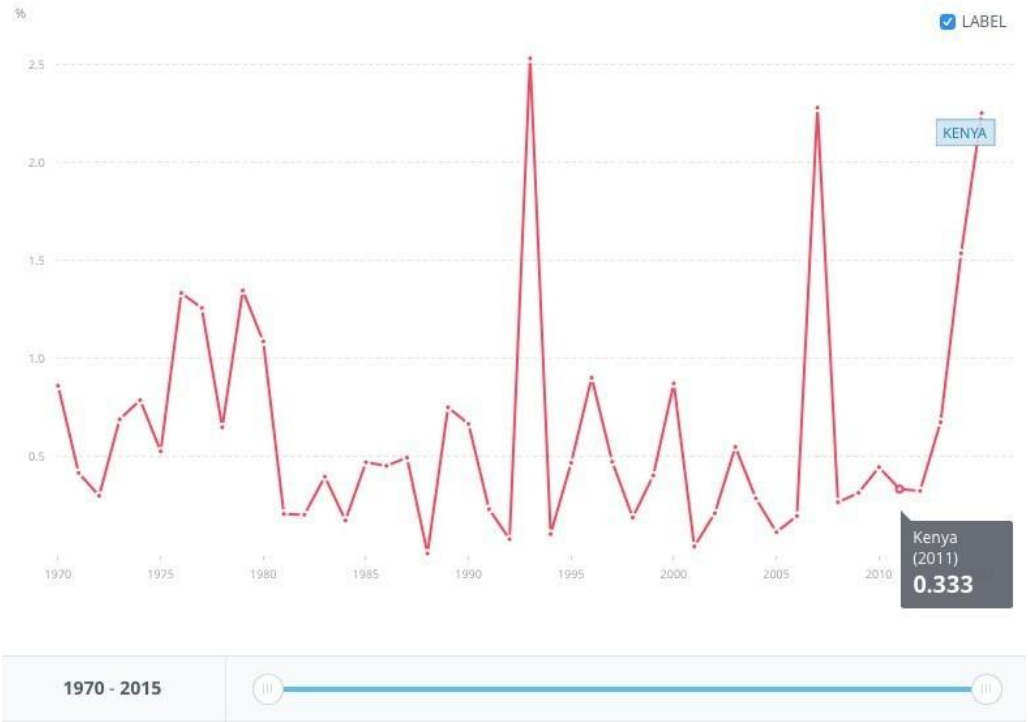
ICSID	Average Duration	Minimum Duration	Maximum Duration
Registration to constitution of tribunal	243 days (8 months)	7 days	3287 days (9 years)
Constitution of	578 days	30 days	2009 days

tribunal to last hearing	(1 year 7 months)		(5 years 6 month)
Latest hearing to award	451 days (1 year 3 months)	30 days	2921 days (8 years 4 months)
Subtotal	1279 days (3 years 6 months)	213 days (7 months)	4443 days (12 years 2 months)
Award to annulment decision	1279 days (2 years 7 months)	395 days (1 year 1 month)	3470 days (9 years 6 month)
Total (including annulment)	2282 days (6 years 3 months)	395 days (1 year 1 month)	4838 days (13 years 3 months)

Graph 1



Graph 2



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