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# Reassessing ICSID: Legitimacy, Reform, and the Future of Investor-State Arbitration

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**ABSTRACT**

*The International Centre for Settlement of Investment Disputes (ICSID) has long served as the backbone of investor-state dispute settlement (ISDS), offering a neutral platform to resolve disputes between foreign investors and sovereign states. Established to encourage foreign direct investment by depoliticizing conflict resolution, ICSID has since grown into a pivotal institution in the international investment regime. However, it now faces a legitimacy crisis characterized by criticism of pro-investor bias, lack of transparency, inconsistent rulings, elite arbitrator networks, and undermining of democratic governance.*

*This paper provides a critical examination of ICSID's legal structure and procedural operation, analyzes the systemic sources of its legitimacy crisis, and surveys reform proposals and alternative models of investment dispute resolution. The analysis draws on recent ICSID caselaw, institutional reforms such as the 2022 Rule amendments, and global efforts toward establishing a Multilateral Investment Court.*

*It concludes that while incremental reforms have improved procedural fairness, deeper structural transformations are needed to balance investor protection with public interest governance. Unless ICSID and ISDS are reimagined in a more equitable and accountable form, the risk of institutional erosion and political backlash will persist.*

## I. INTRODUCTION

The International Centre for Settlement of Investment Disputes (ICSID), created by the 1965 Washington Convention, has emerged as the world's leading institution for the settlement of disputes between host states and foreign investors. Instituted under the auspices of the World Bank, ICSID was formed to depoliticize investment disputes, give legal certainty, and enhance cross-border investment flows, especially in developing economies[2]. By providing an impartial, rule-of-law platform, ICSID attempted to dispel investor concerns regarding host state bias, inadequate domestic legal institutions, or politically motivated takings.

Over the almost six decades since its creation, ICSID has resolved hundreds of high-value

[1] Author is an Advocate at Bar Council of India, India.

[2] Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford Univ. Press 2007).

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disputes, generating a developing jurisprudence and mapping the perimeter of international investment law (IIL). Its arbitration process is enshrined in thousands of bilateral investment treaties (BITs) and increasingly multilateral and plurilateral trade agreements. These aspects have rendered ICSID pivotal to investor-state dispute settlement (ISDS) architecture.

Yet, its global impact has also established ICSID as a lightning rod for controversy. Legal commentators, civil society groups, states, and multilateral institutions have voiced serious reservations about the legitimacy of the system. Pro-investor bias on a systematic level, opacity, arbitral inconsistency, dependence on an intimate group of elite arbitrators, and undermining state regulatory control have created a legitimacy crisis that taints the future viability of the ISDS regime.

These criticisms have gained greater relevance in the face of changing global paradigms: the ascent of the emerging economies, increased emphasis on climate regulation, new priority accorded to human rights and sustainable development, and the rebalancing of globalization in the aftermath of financial, health, and geopolitical crises. With the number and complexity of cases on the rise—and as sovereign regulatory space converges with private capital interests—the question is: Does ICSID continue to meet its founding mandate in a way that is legitimate, fair, and sustainable?

This article analyzes that question by probing the complex legitimacy problems confronting ICSID and considering whether recent reforms and alternative suggestions sufficiently satisfy the stated concerns. It places ICSID within the larger international economic governance paradigm and provides a critical examination of its organization, operations, and future course.

## II. ICSID ARBITRATION: LEGAL FRAMEWORK AND STATUS QUO

### A. Establishment and Purpose

The International Centre for Settlement of Investment Disputes (ICSID) was created in 1965 through the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, also referred to as the Washington Convention or the ICSID Convention. It was a response to the World Bank's realization of the necessity for an institutional forum that could address the political and legal risks that foreign investors typically experienced when investing in developing nations.

ICSID's general aim is to create a neutral, depoliticized, and enforceable forum for resolving investment disputes between investors and host states. In contrast with customary mechanisms

of diplomatic protection among states, ICSID enables private investors to initiate proceedings directly against sovereign states, a revolutionary innovation in international dispute settlement when it was drafted. [3]This aspect emerged as the cornerstone of international investment law, reinforcing investor confidence and encouraging the movement of cross-border foreign direct investment (FDI). The ICSID Convention stands out from other conventions through its establishment of an independent arbitration system. The awards made under this system are not appealable or annulable by host state courts, giving a level of finality and legal certainty that is typical in cross-border arbitrations. [4]This independence from national judicial systems renders ICSID arbitration highly appealing to foreign investors.

### B. Procedural Structure and Operation

The procedural structure of ICSID arbitration is founded upon three core documents: the ICSID Convention, the ICSID Arbitration Rules, and the Administrative and Financial Regulations. These instruments combined are a harmonious, comprehensive, and frequently updated collection of rules intended to assure the speedy and equitable settlement of disputes.ICSID tribunals are usually constituted with three arbitrators: one by the investor, one by the State, and a third and usually presiding one by agreement between them or, failing such agreement, by the Chairman of the ICSID Administrative Council. Arbitrators shall be persons of recognized competence in international law, and of the highest moral character.The Secretariat of ICSID, led by the Secretary-General, plays an important administrative and logistical role. It is tasked with registering requests for arbitration, constituting tribunals, handling case logistics, and coordinating communication between the tribunal and the parties. Where a party does not appoint an arbitrator or agree on the presiding arbitrator, the Secretary-General may make the respective appointments, thus not bringing the proceedings to a halt.ICSID tribunal awards are final and binding. Article 54 of the ICSID Convention stipulates that Contracting States recognize and shall enforce awards "as if they were a final judgment of a court of that State." Interestingly, enforcement may not be refused on grounds of national public policy or procedural reasons, which distinguishes ICSID from other arbitral systems based on the New York Convention, where there is still some room for refusal of enforcement by national courts.In order to maintain procedural integrity, the ICSID Convention grants at most limited post-award relief, e.g., annulment for procedural

[3] United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2020* (UN 2020).
[4] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, opened for signature Mar. 18, 1965, 575 U.N.T.S. 159 (entered into force Oct. 14, 1966) [hereinafter ICSID Convention], pmbl. para. 1.

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deficiencies or failure of jurisdiction. [5]Such relief is examined by ad hoc committees formed within the ICSID system, not national courts, to ensure the independence of the ICSID system.

### C. Growing Caseload and Shifting Dynamics

From its establishment, ICSID's caseload has grown steadily. In 2023, there were over 850 registered cases, demonstrating increasing resort to investor-state arbitration in a globalized world of investments. All sectors of the economy are represented in the cases, with the most disputed being energy, mining, telecommunications, financial services, and infrastructure projects.

Early on, ICSID disputes primarily involved developed-country investors suing developing countries, frequently in Latin America, Sub-Saharan Africa, or Central Asia. Recently, though, the situation has changed. Claimants from emerging markets have more and more turned to filing claims against ICSID, while developed nations like Canada, Spain, and Germany have appeared as defendants in significant investment arbitrations, frequently involving regulatory shifts in renewable energy initiatives or public health measures.[6]

The increasing application of ICSID has also created intensified criticism and scrutiny. ISDS mechanisms, including the ICSID, undermine regulatory sovereignty, restrict States' powers to pass legislation in the public interest, and are nontransparent, according to some States and commentators. Such has motivated reform efforts, such as recent ICSID Rule changes in 2022, to streamline processes, decrease costs, and enhance transparency through initiatives like the publication of awards and public hearings.[7]

In addition, regional options like the PCA and the new Multilateral Investment Court (MIC) proposal, under UNCITRAL auspices, indicate increased interest in systemic reform of ISDS. However, ICSID is the prevailing institutional system, applied in thousands of bilateral investment treaties (BITs) and free trade agreements (FTAs) as the first-choice forum for investor-State arbitration.

ICSID's function continues to develop. The institution is not only viewed today as a judiciary, but also as a central contributor to the formation of international investment jurisprudence. [8]By its expanding number of awards, ICSID contributes to the development of the rules

[5] ICSID Convention, art. 54.
[6] ICSID, *ICSID Caseload – Statistics* (Issue 2023-1), https://icsid.worldbank.org/resources/publications/icsid-caseload-statistics.
[7] Susan D. Franck, Empirically Evaluating Claims about Investment Treaty Arbitration, 86 N.C. L. Rev. 1 (2007).
[8] Daniel Behn, Malcolm Langford & Sergio Puig, *Diversity and Legitimacy in Investment Arbitration*, in

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regarding such notions as fair and equitable treatment, expropriation, and legitimate expectations, though consistency and predictability are perennial preoccupations.

## III. THE LEGITIMACY CRISIS: SOURCES AND CRITIQUES

The rise of investor-state dispute settlement (ISDS) through ICSID has sparked a growing legitimacy crisis. Critics argue that ICSID, while promoting investment protection, often fails to align with evolving norms of public accountability, transparency, and sovereign equality. This crisis is not rooted in isolated incidents but is systemic, reflecting deeper tensions between global capital and national governance structures.

### A. Perceived Pro-Investor Bias

One of the intrinsic criticisms of ICSID arbitration is that it has a perceived pro-investor bias over states. Empirical research has indicated that investors achieve good results, either full or partial victories, in the vast majority of ICSID cases. While this correlation may not establish causation, this statistical fact helps to fuel the broad perception, particularly among nations in the Global South, that the system is biased.

This problem is exacerbated by asymmetric procedural dynamics. Investors instigate the dispute, appoint an arbitrator, control the makeup of the tribunal, and define the law through high-funded international law firms. States, particularly those with weak legal infrastructure, are compelled to respond defensively under short time frames and at great legal expense. This structural asymmetry tends to project power imbalances between multinational corporations and developing economies. [9]Perception of bias is also heightened when ICSID tribunals invalidate public welfare actions, like environmental policies or tax law changes, as treaty violations. Cases like Philip Morris v. Uruguay (tobacco control) and Vattenfall v. Germany (environmental licensing) have become symbols of ISDS's intrusion into democratic policymaking.

### B. Transparency and Public Participation Deficits

In the past, ICSID proceedings were marked by their secrecy. This shroud of confidentiality has been objected to as being antithetical to democratic principles, particularly in cases where controversies concern matters of crucial public interest like health codes, water supply agreements, or energy subsidization. ICSID tribunals are different from national courts, as they are not necessarily accountable to the public whose lives tend to be impacted by the

*Legitimacy of Unseen Actors in International Adjudication* (Freya Baetens ed., Cambridge Univ. Press 2019).

[9] David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (Cambridge Univ. Press 2008).

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rulings.

Legal scholars, public interest groups, and civil society organizations have maintained that ICSID was a "secret court system," off-limits to journalists, NGOs, and legislators. This calls into question not just procedural justice, but the legitimacy of the results as well[10].

New reforms of transparency to the 2022 ICSID Rules, including default publication of awards (with the agreement of parties) and public hearings, are an improvement. But such reforms are still conditional upon the agreement of parties to disclose. Consequently, most procedures remain closed to the public. [11]In the few instances where governments are compelled to explain social policies, continued lack of public scrutiny continues to erode confidence in the institution.

### C. Inconsistency and Fragmentation of Jurisprudence

Another gravely endangering challenge to the legitimacy of ICSID is the absence of doctrinal coherence. In contrast to hierarchical judicial systems, ICSID is not subject to a common jurisprudential authority or appellate court. Consequently, various tribunals have arrived at diverging answers to the same legal standards, e.g., the extent of "fair and equitable treatment" (FET), the meaning of "full protection and security," or the threshold for "indirect expropriation."[12]

This fragmentation of jurisprudence erodes the principle of legal certainty. Both states and investors are uncertain about outcomes, generating a chilling effect on both national policymaking and flows of investment. The ICSID Convention annulment mechanism, while a protection against procedural error, is not substantive review of the law. As a result, ICSID jurisprudence can represent arbitral subjectivity more than a uniform evolution of the rule of law.

### D. Arbitrator Conflicts and Elite Networks

Critics have also identified the restricted, overlapping network of arbitrators that controls ICSID tribunals. A limited circle of legal elites, commonly known as the "ISDS club," is persistently appointed, resulting in hazards of groupthink, reputational bias, and conflicts of interest.[13]

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[10] Lise Johnson & Lisa Sachs, The Public Interest in International Investment Arbitration (Columbia Center on Sustainable Investment 2017).
[11]UNCTAD, *Fair and Equitable Treatment: A Sequel*, UNCTAD Series on Issues in International Investment Agreements II (2012).
[12] Nadja Alexander, *International and Comparative Mediation: Legal Perspectives* (Kluwer Law Int'l 2009).
[13] Zachary Douglas, *The International Law of Investment Claims* (Cambridge Univ. Press 2009).

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This is especially suspect where arbitrators at the same time serve as counsel in other investor-state cases, or where their commercial relationships to law firms and corporate clients can affect decision-making. [14]The absence of real diversity by gender, geography, and legal traditions also serves to highlight that perception of ICSID as an institution operating for a privileged elite.

There are attempts to foster impartiality by way of disclosure and challenge mechanisms, but they are deemed ineffective by their critics. The proof necessary to disqualify is onerous, and challenge decisions are taken in the ICSID context, which generates issues relating to independence[15].

### E. Democratic Deficit and Regulatory Chill

ISDS mechanisms, including ICSID, are often presented as circumventing national legal systems and democratic accountability. Investors can circumvent national courts, even in countries with effective judicial systems, by resorting to international arbitration, thereby privileging foreign capital over national law.[16]

Fear of adverse arbitration awards has given rise to a phenomenon known as "regulatory chill," in which governments hesitate to adopt progressive legislation, especially in areas such as climate change, labor rights, or digital taxation, due to potential ISDS liability.[17] This is particularly acute in developing countries, where the threat of a multi-billion-dollar award can derail public policy planning.

In these contexts, ICSID is viewed not only as a legal institution but also as a limitation on sovereign autonomy, drawing criticism from human rights advocates, environmental groups, and development agencies.

## IV. ADDRESSING THE LEGITIMACY CRISIS: REFORM PROPOSALS AND DEVELOPMENTS

The legitimacy issues confronting ICSID have generated a tide of reform suggestions both at institutional and treaty levels. Although some of these efforts have borne fruit in the form of actual change, others are still pipedreams. The path to a more equitable ISDS system encompasses both internal evolution within ICSID and external readjustment of international

[14] Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation*, 104 Am. J. Int'l L. 179 (2010).
[15] Malcolm Langford, Daniel Behn & Runar Hilleren Lie, *Empirical Perspectives on Investment Arbitration* (Cambridge Univ. Press 2022).
[16] European Commission, *Proposal for a Multilateral Investment Court* (2017), https://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156042.pdf.
[17] Malcolm Langford, Daniel Behn & Runar Hilleren Lie, *Empirical Perspectives on Investment Arbitration* (Cambridge Univ. Press 2022).

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investment law generally.

### A. Recent Institutional Reforms

The **2022 amendment to the ICSID Arbitration Rules** was the most comprehensive in the institution's history. Key reforms include:

- **Mandatory disclosure of third-party funding**, improving transparency about who financially backs claims;
- **Expedited procedures** for faster resolution of low-value disputes;
- **Enhanced rules for arbitrator challenge and disqualification**, providing clearer standards and timelines;
- **Provisions for greater transparency**, including publication of awards, decisions, and open hearings (subject to party consent).

These reforms are a welcome step, but critics argue that they address **procedural symptoms** rather than **systemic causes**. Notably, the reforms stop short of introducing an appellate mechanism or significantly altering the balance of rights and obligations between states and investors.

### B. Proposal for an Appellate Mechanism

One of the most widely debated reforms is the creation of an appellate institution inside or outside ICSID. An appellate system could resolve contradictions, increase doctrinal consistency, and put more faith in ISDS rulings.

Models for such a mechanism are diverse. Some call for an ICSID-based appellate chamber, others a treaty-based multilateral appellate system. The United States, Canada, and the EU have included appellate provisions in recent agreements (e.g., USMCA, CETA). Such reforms, however, are met with political opposition because of worries about cost, delay, and relinquishing ultimate authority to a new body.[18]

### C. Multilateral Investment Court (MIC)

The most comprehensive reform is the European Commission's proposal for a Multilateral Investment Court (MIC). It calls for a permanent institution with full-time, publicly appointed judges, transparent procedures, and an appeal mechanism.

Negotiations in UNCITRAL Working Group III have been attended by more than 100 states. Although the MIC would be able to respond to some of the most common complaints against

[18] Sergio Puig, *Social Capital in the Arbitration Market*, 25 Eur. J. Int'l L. 387 (2014).

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ISDS—like fragmentation and independence of arbitrators—it also creates concerns about sovereignty. Some nations, like the United States and Japan, have hesitated, arguing that a central court would make treaties less flexible.[19]

### D. Arbitrator Diversity and Selection Reform

To counter the perceived elitism in ISDS, several initiatives aim to **broaden the arbitrator pool**:

- Encouraging states to **nominate women and non-Western experts** to ICSID panels;
- Creating **regional rosters** and rotating selection lists;
- Introducing **random or institutional appointment mechanisms** to reduce repeat-player dynamics.

The success of these efforts depends on political will, institutional leadership, and rethinking how legitimacy is tied to representativeness in international adjudication.

### E. Promoting Mediation and State-State Dispute Settlement

Understanding that arbitration is not always an appropriate choice for every conflict, ICSID created rules of mediation to promote friendly settlement. Mediation provides an expedited, less confrontational, and possibly more cooperative approach to the resolution of disputes, particularly in industries where a long-term relationship is vital (e.g., public services or infrastructure).[20]

Furthermore, others recommend the revival of state-to-state conflict mechanisms, which might reduce investor-state tensions and enable political solutions for contentious cases.

### F. Treaty Recalibration and Exit Strategies

Several countries have taken proactive steps to reform their **investment treaty frameworks**. For instance:

- **South Africa** terminated its BITs with European states and adopted domestic legislation to govern investor protection;
- **India** replaced its older BITs with a model BIT emphasizing exhaustion of local remedies and narrowed investor rights;

[19] UNCTAD, *International Investment Agreements Navigator*, https://investmentpolicy.unctad.org/.
[20] Daniel Behn, Malcolm Langford & Sergio Puig, Diversity and Legitimacy in Investment Arbitration, in Legitimacy of Unseen Actors in International Adjudication (Freya Baetens ed., Cambridge Univ. Press 2019).

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- **Ecuador** withdrew from ICSID and later reviewed its treaties under a constitutional mandate.

Such treaty recalibrations reflect a broader trend of reasserting regulatory space and integrating sustainable development goals into investment policy. UNCTAD's Investment Policy Framework for Sustainable Development supports these efforts by providing states with guidance on drafting balanced and forward-looking investment treaties.

## V. CONCLUSION

The legitimacy crisis which confronts ICSID arbitration is two-dimensional and has historical origins. Whilst ICSID has been a dominant driver of investor confidence and legal certainty, it now needs to adapt to the challenges of a more nuanced, multipolar, and values-based international order.

The heart of the crisis is not just in perceptions, but also in institutional structure, power imbalances, and constrained responsiveness to democratic governance needs. All stakeholders—from arbitrators and States to civil society and multilateral institutions—have to participate in persistent, principled reform efforts.

Reform is already in motion, but marginal procedural tweaks will not suffice unless they are supported by a paradigm shift in conceptualizing investment protection, state sovereignty, and global public goods. ICSID, and ISDS overall, has to realign itself to an inclusive, accountable, and international legal pluralist model. Regardless of whether it comes through systemic change, institutional creativity, or regional models, the future of investor-state arbitration will be contingent on its capacity to find a new balance: one that balances investors' rights with the ability of states to act in the public interest.

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