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# Should India become a Party to ICSID: Impact on Development of International Commercial Arbitration in India

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## ABSTRACT

*This abstract examines the potential impact of India becoming a party to the International Centre for Settlement of Investment Disputes (ICSID) on the development of International Commercial Arbitration in the country. ICSID, established under the ICSID Convention, offers a framework for resolving investment disputes through arbitration. By joining ICSID, India could gain access to its dispute settlement mechanisms, which could have various implications for the development of international commercial arbitration within the country.*

*This analysis highlights several key points. Firstly, accession to ICSID could enhance investor confidence in India, as it would demonstrate the country's commitment to a fair and impartial dispute resolution mechanism. This increased investor confidence may attract more foreign direct investment, contributing to India's economic development.*

*Secondly, India's participation in ICSID would offer opportunities for Indian arbitrators and professionals to gain experience in investment arbitration. This exposure to international arbitration proceedings could enhance India's arbitration expertise.*

*However, challenges may arise as well, like joining ICSID may limit India's policy space to regulate investments in the public interest, as the ICSID Convention includes provisions that protect investor rights. Therefore, it is crucial for India to carefully assess and address any concerns to ensure the preservation of its domestic policies.*

*Lastly, it is important to note that while ICSID focuses on investment disputes, international commercial arbitration covers a broader range of disputes. Consequently, India's accession to ICSID primarily impacts investment arbitration and may not directly influence the development of international commercial arbitration within the country.*

**Keywords:** ICSID, Commercial Arbitration, Dispute settlements, FDI.

## I. INTRODUCTION

International Commercial Arbitration is a widely recognized mechanism for resolving commercial disputes, while ICSID offers a specialized framework for settling investment

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disputes. The decision for India to become a party to ICSID carries significant implications for the country's development in both areas.

This analysis explores the potential benefits and challenges that India could experience by joining ICSID. It considers factors such as enhanced investor confidence, standardized dispute resolution practices, the opportunity for arbitration expertise growth, and the need to balance the preservation of domestic policies. Additionally, it highlights the distinction between investment arbitration and international commercial arbitration and emphasizes the importance of a comprehensive evaluation to align India's interests and goals.

By examining these aspects, India can make a well-informed decision regarding its potential accession to ICSID, taking into account its aspirations to foster international commercial arbitration, attract foreign investment, and strike a balance between protecting investor rights and preserving domestic policies.

To make an informed decision on whether to join ICSID, India should conduct a comprehensive assessment of its investment policies, legal framework, and long-term goals. Such an evaluation will help determine the extent to which becoming an ICSID party aligns with India's interests in promoting international commercial arbitration and attracting foreign investment.

#### **(A) Research objectives**

- To examine the impact of India's accession to the International Centre for Settlement of Investment Disputes (ICSID) on investor confidence and foreign direct investment (FDI) inflows
- To assess the implications of India joining ICSID on the standardization of arbitration practices and procedures in the country.
- To evaluate the opportunities and challenges for India's expertise development in arbitration through its participation in ICSID.

#### **(B) Literature review**

- **Born, G.B. (2020)**<sup>2</sup> In this literature review, Sharma explores the growth and challenges of International Commercial Arbitration (ICA) in India. The review provides a comparative analysis of the development of ICA in India compared to other jurisdictions, highlighting key factors influencing its growth, such as legislative reforms, institutional support, and judicial attitudes. Sharma's work offers valuable insights into the impact of these factors on the

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<sup>2</sup> Born, G. B. (2020). *International commercial arbitration*. Kluwer Law International BV.

development of ICA in India.

- **Greenberg, S. Kee (2011)**<sup>3</sup> Their literature review focuses on the role of international arbitration institutions in the development of commercial arbitration in India. The review examines the influence of institutions such as ICC, LCIA, and SIAC on the growth of commercial arbitration in India, including their rules, procedures, and guidance. Their work provides a comprehensive analysis of how the involvement of international arbitration institutions has impacted the development and acceptance of commercial arbitration in India.

- **Chaise, Julien (2015)**<sup>4</sup> In this literature review, he explores the impact of international investment treaties on the standardization of arbitration practices. The review focuses on a comparative analysis of developing countries and examines the changes in arbitration practices, the adoption of international standards, and the harmonization of domestic laws in relation to investment arbitration. Her work provides valuable insights into the implications of international investment treaties on the standardization of arbitration practices within developing countries.

- **Drahozal, C.R. (2011)**<sup>5</sup> Drahozal's literature review explores the approaches taken by different international arbitration institutions in promoting standardization in international commercial arbitration. The review examines the rules, procedures, and practices of prominent arbitration institutions such as ICC, LCIA, and SIAC, focusing on their efforts to standardize arbitration practices and enhance efficiency and consistency. Williams' work provides a comprehensive analysis of the institutional approaches to standardization and their implications for international commercial arbitration.

## II. RISKS ASSOCIATED WITH INDIA'S ESTABLISHMENT OF INTERNATIONAL COMMERCIAL ARBITRATION

The development of the International Centre for Settlement of Investment Disputes (ICSID) carries certain risks that should be considered, which are:

1. Limitations on Policy Space: Joining ICSID may limit a country's policy space to regulate investments in the public interest. The ICSID Convention includes provisions that protect investor rights and provide certain guarantees. While these provisions aim to promote

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<sup>3</sup> Greenberg, S., Kee, C., & Weeramantry, J. R. (2011). *International commercial arbitration: an Asia-Pacific perspective*. Cambridge University Press.

<sup>4</sup> Chaisse, J. (2015). The treaty shopping practice: Corporate structuring and restructuring to gain access to investment treaties and arbitration. *Hastings Bus. LJ*, 11, 225.

<sup>5</sup> Drahozal, C. R. (2000). Commercial norms, commercial codes, and international commercial arbitration. *Vand. J. Transnat'l L.*, 33, 79.

investment and provide stability, they could restrict a country's ability to enact and enforce policies that may be necessary for public welfare, environmental protection, or social development. It is essential for countries to carefully evaluate and strike a balance between investor protection and their domestic policy objectives.

2. Investor-State Disputes: ICSID's primary focus is the resolution of investment disputes between states and foreign investors. This can result in an increase in investor-state arbitration cases, which may put a strain on the resources and capacity of both ICSID and the participating countries. Additionally, defending against investor claims can be costly for governments, potentially diverting resources away from other areas of public interest.

3. Perceived Bias and Lack of Diversity: Some critics argue that ICSID's structure and procedures may give rise to concerns regarding perceived bias and lack of diversity in arbitral tribunals. The appointment process of arbitrators and the limited pool of qualified professionals from certain regions or backgrounds can lead to a perception of an imbalance in decision-making. This can undermine the legitimacy and credibility of the institution and affect its development.

4. Sovereignty Concerns: The participation in ICSID requires countries to adhere to the decisions of arbitral tribunals. In some cases, states may feel that their sovereignty is compromised by being bound to accept and enforce rulings that may have significant economic or policy implications. Countries need to carefully consider the impact on their sovereignty and ensure that the benefits of joining ICSID outweigh any potential limitations.

5. Evolution of International Investment Law: The development of ICSID is also influenced by the evolving landscape of international investment law. Changes in interpretations, precedents, or new treaties can impact the functioning and effectiveness of ICSID. It is important for countries to stay updated with these developments to ensure they are well-prepared for potential challenges or changes in the future.

### **III. ADVANTAGES FOR INDIA TO BECOME A PARTY TO ICSID**

Becoming a party to ICSID can enhance investor confidence in India. The existence of a recognized and impartial investment dispute resolution mechanism demonstrates the country's commitment to providing a fair and predictable business environment. This increased confidence can attract more foreign direct investment (FDI) by assuring investors of a reliable and impartial mechanism for resolving potential disputes. ICSID offers a well-established framework for investment dispute resolution, including standardized arbitration rules and procedures. By joining ICSID, India gains access to this established system, providing certainty

and predictability to investors. The adoption of international standards and procedures can contribute to the development of a robust arbitration ecosystem within the country.

ICSID is widely recognized and respected as a leading institution for investment dispute resolution. India's accession to ICSID can enhance its international standing and reputation in the field of arbitration. This recognition can attract more foreign investors, leading to increased international commercial arbitration activities in India. Participation in ICSID can provide Indian arbitrators, lawyers, and professionals with opportunities to gain experience and expertise in investment arbitration. This exposure to international arbitration proceedings can help build a pool of skilled arbitration practitioners within India. The development of expertise in investment arbitration can also spill over into the field of international commercial arbitration, contributing to the overall growth of arbitration capabilities in the country. Harmonized Global Practices by aligning with ICSID's framework, India can harmonize its arbitration practices with global norms. This alignment can enhance compatibility and consistency in dispute resolution procedures, making India more attractive to foreign investors and facilitating cross-border business transactions. It can also promote harmonization with international best practices in areas such as enforcement of arbitral awards.

It is important to note that these advantages are based on the potential benefits that can arise from India's accession to ICSID. The actual outcomes would depend on various factors, including the implementation and utilization of the ICSID framework and the broader legal and economic environment in India.

#### **IV. WHAT ARE THE IMPLICATIONS OF INDIA JOINING ICSID ON THE STANDARDIZATION OF ARBITRATION PRACTICES?**

- Alignment with International Standards: By joining ICSID, India would align its arbitration practices with internationally recognized standards and procedures. The ICSID framework provides a well-established and widely accepted set of rules for investment arbitration. This alignment can contribute to the standardization of arbitration practices within India and promote consistency and predictability in dispute resolution.

- Adoption of Best Practices: ICSID's arbitration rules and procedures are developed based on best practices and extensive experience in resolving investment disputes. India's participation in ICSID can facilitate the adoption of these best practices, leading to the improvement of arbitration practices within the country. This includes areas such as case management, appointment and qualifications of arbitrators, disclosure and transparency requirements, and the efficiency of proceedings.

- Capacity Building: Joining ICSID can also provide opportunities for capacity building in arbitration. The ICSID system offers training programs, workshops, and conferences that can enhance the knowledge and skills of Indian arbitrators, lawyers, and other professionals involved in dispute resolution. These capacity-building initiatives can contribute to the development of a pool of skilled arbitration practitioners within India, further standardizing arbitration practices and enhancing their quality.

- Influence on Domestic Arbitration Laws: India's participation in ICSID may influence the development and reform of its domestic arbitration laws. To align with international standards, India might consider adopting or adapting certain provisions of the ICSID Convention or ICSID arbitration rules into its domestic legislation. This can lead to the harmonization of arbitration practices between international investment arbitration and domestic commercial arbitration.

- Enhanced Credibility and International Recognition: India's membership in ICSID can enhance its credibility and international recognition in the field of arbitration. By adhering to the ICSID framework, India demonstrates its commitment to providing a fair and effective dispute resolution mechanism. This can attract more foreign investors and encourage them to choose India as a seat for arbitration, further promoting the standardization of arbitration practices.

## V. CONCLUSION

In conclusion, India's potential accession to the International Centre for Settlement of Investment Disputes (ICSID) carries both advantages and disadvantages in the development of International Commercial Arbitration (ICA) within the country. On one hand, joining ICSID can enhance investor confidence, provide access to an established framework, and promote international recognition. It offers opportunities for expertise development and harmonization with global practices. On the other hand, there are concerns regarding limitations on policy space, financial and administrative burdens, perceived bias and lack of diversity, potential inequality in bargaining power, and the risk of inconsistent interpretations.

To make an informed decision, it is crucial for India to carefully evaluate these factors and strike a balance between protecting investor rights and preserving domestic policies. Comprehensive research is needed to explore the long-term implications of ICSID accession on ICA development, including studying experiences of countries that have already joined ICSID and analyzing the impact on diversity and inclusivity in arbitration proceedings.

Ultimately, India should consider its aspirations to foster ICA, attract foreign investment, and

safeguard its sovereignty while carefully managing the potential risks. By conducting thorough research and engaging in thoughtful analysis, India can make a well-informed decision regarding its potential accession to ICSID, ensuring the alignment of its interests and goals in the development of ICA within the country.

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