Analysis of ICSID Arbitration from the Perceptive of Developing Countries: A Bittersweet Choice

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Abstract

There are growing concerns among developing countries on the arbitration proceeding of the International Center for Settlement of Investment Dispute (ICSID). The worries range from the transparency of arbitral proceedings; high arbitral costs; exclusion of national courts to the unsatisfactory nature of annulment proceedings. Investors' mounting claims against developing state, the link of ICSID to the World Bank, and their lack of resources to bear costs of defending against well-resourced investors make developing states to believe that they are at a comparative disadvantage compared with developed states and their investors. Although Ethiopia is not a party to the convention, many of its Bilateral Investment Treaties (BITs) accept ICSID jurisdiction. Thus, the main purpose of this paper is to examine the cost and benefit of ICSID in the context of developing countries. Besides, relevant BITs of Ethiopia that recognize jurisdiction of the Center are analyzed to explore the potential consequences in the event that it ratifies the ICSID. Relying on the doctrinal research methodology, the article examined the ICSID convention, scholarly research findings and the literature in the field. After due analysis, the author concluded that introducing the appellate system, ensuring transparency of the arbitration process and the publication of awards would address the concerns of developing countries. The article also argues that many of Ethiopia's BITs are inconsistent and vague with regards to submission to the jurisdiction of the Center, which implicates the need to have a model BIT.

Keywords: ICSID, Arbitration, Transparency, Developing countries, Consent, Ethiopia, BIT.

Introduction

In principle, investment benefits all parties involved. Investors can expand the market and productivity thereby accrues more profit. For the host state, particularly developing countries, investment is a crucial factor for economic

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and social development, sustained economic growth, poverty reduction, improved infrastructure, and financial stability as investment help to maintain the balance of payment problem.[1] Also, investment results in transfer of knowledge and technology, creates jobs, boost overall productivity, and enhance competitiveness and entrepreneurship.[2]

A central challenge for developing countries, however, is how to strike a balance between the need for more investment flows and to secure their sovereign interest at home. For developing countries, the move to protect public interest such as public health, environmental protection, labor standards, and the legitimate interests of the investor is a lasting issue in international investment governance.[3] Those Countries with a favorable investment legal framework to protect the interest of investors attract more investment. Favorable conditions for foreign investments include a legal framework with reliable protection of property rights, an independent and effective judicial system, and a prudent dispute settlement system.[4]

The Convention on the Settlement of Investment Disputes between States and Nationals of Other States established ICSID, as a center for settlement of investment disputes. More specifically, the executive directors of the World Bank formulated the ICSID Convention in 1966.[5] As of June 2020, 155 States have ratified the ICSID Convention while there are 163 signatory States.[6]

As stated under the provisions of the Convention, ICSID provides facilities for conciliation and arbitration of investment disputes between the contracting States and nationals of other contracting states.[7] The provisions of the ICSID Convention are complemented by Regulations and Rules adopted by the Administrative Council of the Centre according to Article 6(1) (a)–(c) of the

[1] Organization for Economic Co-operation and Development (OECD), Foreign Direct Investment for Development, *OECD Publications (2002)*, p. 5. See also L Colen, MMaertens, and J Swinnen, 'Foreign Direct Investment as an Engine for Economic Growth and Human Development: A Review of the Arguments and Empirical Relevance,' *Hum Rts& Int'l Legal Discourse, Vol.* 177, (2009); Salacuse, BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries, *Int'l Law*, Vol. 24, (2009), p. 655.

[2] Ibid.

[3] Matthias Herdegen, Principles of International Economic Law, 2nd ed., Oxford University Press, (2017), p.405.

[4] UN, Report of the International Conference on Financing for Development, UN Doc A/ CONF.198/ 11, Monterrey, Mexico, (18– 22 March 2002), para 2.

[5] ICSID Convention Rules and Regulation, available at https://icsid.worldbank.org›Documents › resources last visited on 11 February 2020. (Hereafter called *ICSID convention*).

[6] World Bank, Database of ICSID Member, available https://icsid.worldbank.org/about/member-states/database-of-member-states/ last visited on 11 February 2020.

[7] ICSID Convention, *supra* note 5.

Convention (hereinafter the ICSID Regulations and Rules). The ICSID Regulations and Rules comprise of Administrative and Financial Regulations, Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules), Rules of Procedure for Conciliation Proceedings (Conciliation Rules), and Rules of Procedure for Arbitration Proceedings (Arbitration Rules). Despite the vast majority support for ICSID, there are skeptics among some developing countries against the fairness of international investment agreements and investment arbitration.[8] Developing countries have accused many powerful global corporations of taking advantage through the international investment regime.[9] In this regard, the criticism on ICSID is that the Center prioritizes the rights and interests of corporate investors at the expense of the social and environmental goals in developing countries.[10] Some developing countries like Bolivia, Ecuador, and Venezuela are taking extreme measures by withdrawing from the Convention.[11]

Ethiopia is a signatory state to the ICSID convention, but it has not yet ratified the convention. However, ICSID mechanisms certainly have impact on Ethiopia since almost all its BITs recognized submission to the jurisdiction of ICSID and its additional facilities. During the writing of this article, Ethiopia has signed over 33 BITs with foreign Countries.[12] Almost all BITs have referred to ICSID as one of the dispute resolution mechanisms. To the best of the knowledge of this author, the Ethiopian BITs that do not refer to ICSID are those with Libya, Brazil, Russia, and Netherland.[13] Hence, the consequences of referring to the ICSID jurisdiction, without ratifying the ICSID Convention, need to be examined.

Using doctrinal research methodology, this article scrutinizes the ICSID Convention, various reports, scholarly research finding and other literatures in the field. Also, the experience of countries that withdraw from ICSID is

[8] ICSID members update, available at http://www.ibanet.org/Article/Detail.aspx?ArticleUid=78296258-3B37-4608-A5EE-3C92D5D0B97 last visited on 20 March 2020. Bolivia, Ecuador, and Venezuela, for instance, withdrew from the ICSID Convention in 2007, 2010, and 2012, respectively.

[9] Pia Eberhardt & Cecilia Olivet, profiting from injustice: How law firms, arbitrators and financiers are fuelling an investment arbitration boom, Corporate Eur. Observatory and the Transnational Inst, (2012), p.24

[10] Sarah Anderson & Sara Grusky, Challenging Corporate Investor Rule, inst. for policy studies & food and water watch *eds*,(200), p.10.

[11] United Nations Conference on Trade and Development, Course on Dispute Settlement: International Centre for Settlement of Investment Disputes, *UNCTAD/EDM/Mis*c, (2003), P.21.

[12] International Investment Agreement Navigator, available at https://investmentpolicy.unctad.org/international-investment agreements/countries/67/ethiopia last visited 13 October 2020.

[13] Ibid.

analyzed to substantiate the concern of developing countries on the issue under consideration. This article examines chiefly the arguments forwarded by developing countries against ICSID. In doing so, the article is organized under four sections. Section one presents the background, purposes, features and jurisdiction of the ICSID. The second section is dedicated to analysis of the criticisms forwarded against ICSID by developing countries. The third section discusses the bilateral investment treaties (BITs) that Ethiopia signed or ratified which refer to the ICSID as a means of dispute settlement mechanism. This section aims to analyze the potential consequences that Ethiopia may encounter if it ratifies the ICSID Convention. Finally, section five provides concluding remarks and forwards recommendations.

1 Overview of the ICSID

1.1 Rationale of ICSID

In general, the ICSID Convention is a multilateral treaty formulated to further the World Bank's objective of promoting international investment.[14] More specifically, ICSID's founding documents reveal three main purposes the Center seeks to achieve. Firstly, ICSID helps to protect foreign investment through the facilitation of investment dispute settlement.[15] ICSID provides facilities and services to support conciliation and arbitration of international investment disputes. It gives investors direct access to an international forum and enables investors to provide in an investment agreement that disputes will be decided under rules of international law. Normally, ICSID does not conciliate or arbitrate the disputes. Rather, it provides the institutional facility and procedural rules for independent conciliation commissions and arbitral tribunals constituted in each case. Besides, arbitration and conciliation under the Convention are voluntary and require the consent of both the investor and state concerned. However, once such consent is given, unilateral withdrawal is impossible.

Secondly, the ICSID Convention seeks to promote investment flows to developing and least-developed states.[16] Besides, Member States and their nationals obtain access to investment dispute settlement under the ICSID Convention as additional forum, and expert services of the Secretariat.

[14] Ibironke T. Odumosu, The Antinomies of the continued relevance of ICSID to the third world, *San Diego international law Journal,* Vol. 8, (2007), P.345, 357.
[15] Ibid.
[16] Ibironke, *supra* note, p 358.

The third goal is to provide an "atmosphere of confidence" for investors and host countries.[17] This is to mean that since foreign investors frequently do not perceive the courts of the host state as impartial to settle investment disputes, the ICSID can serve as alternative forum. Besides, domestic courts are bound to apply domestic laws though the laws fail to protect the investor's rights under international law. Furthermore, as investment disputes are complex and require specialized knowledge, ordinary courts of the host states are not competent to adjudicate the matter appropriately.[18]

1.2. Characteristic Features of the ICSID

As stated before, ICSID is not an international court or tribunal but merely provides an institutional framework that facilitates conciliation and arbitration.[19] Conciliation and arbitration are the two possible methods of dispute settlement provided by the ICSID Convention. Yet, the actual settlement of a dispute takes place mainly through arbitral tribunals constituted on ad-hock basis for each dispute.[20] Conciliation assists the parties in reaching a mutually acceptable agreement.[21] In case of conciliation, both parties must willingly agree to pursue this method of dispute resolution. If the parties reach an agreement, the ICSID commission creates a report noting the issues in the dispute and records the parties' agreed-upon decision.[22] The report generated because of the conciliation is not binding on the parties. The vast majority of cases brought under the ICSID Convention use arbitration proceedings.[23] Arbitration is a more formal process of dispute resolution. If the parties fail to reach an agreed settlement, the tribunal determines an award that is binding and enforceable on both parties. Nonetheless, developing countries criticize arbitration proceedings as a method of dispute settlement under the ICSID.

Second, ICSID Convention offers a procedure for the settlement of investment disputes**.** According to the ICSID Convention, the tribunals have to follow the law agreed upon by the parties. Primarily, it is up to the disputing parties, i.e. the

[17] Ibid.
[18] Christoph, International Center for Settlement of the Dispute, available at https://www.univie.ac.at › in law › word press › pdf › 100_icsid_epil Last visited on 11 May 2020.
[19] ICSID Convention, *supra* note 5.
[20] Christophe, *supra* note 18.
[21] Elizabeth Maul, The International Centre for the Settlement of Investment Disputes and the Developing World: Creating a Mutual Confidence in the International Investment Regime, *Santa Clara Law Review*, Vol. 55, No. 2 (2015), p. 892.
[22] As it is provided in Article 43(2) of ICSID Convention, if the parties reach an agreement, the Commission shall draw up a report noting the issues in dispute and recording that the parties have reached an agreement.
[23] Elizabeth, *supra* note 21, p. 892.

host State and the investor, to agree on the applicable law. These laws include international investment agreements such as BITs, multilateral treaties, and customary international law and domestic investment laws.[24]

Third, ICSID has a delocalized character. The exclusive nature of ICSID arbitral jurisdiction to any other national or international remedy as provided for in Articles 26 and 27(1) respectively delocalize the ICSID remedies. It states that consent of the parties to arbitration under this Convention shall be considered to be consent to arbitration to the exclusion of every other remedy unless otherwise specified. The vital importance of this provision of the Convention was once pointed out by the executive directors of the World Bank in its report on the ICSID Convention. It explains the purpose of this provision under the heading arbitration as an exclusive remedy and when a state and an investor agreed to have recourse to arbitration, and do not preserve to have recourse to other remedies, the parties intend to have recourse to arbitration to the exclusion of any other remedies.[25]

However, there are some exceptions to the delocalization feature of ICSID. Firstly, under article 25(4) the host state may maintain power over its disputes with the foreign investors by either not consenting to ICSID jurisdiction at all or having a limited consent. Any Contracting State may, at the time of ratification, acceptance or approval of the Convention or at any time thereafter, notify the Centre of the class or classes of disputes that it would or would not consider submitting to the jurisdiction of the Centre. Hence, the contracting states can reserve some classes of the dispute to the exclusion of ICSID jurisdiction. Secondly, as the second sentence of Article 26 provides, the contracting parties can stipulate the exhaustion of local remedies as a condition to consent to arbitral submission to the ICSID jurisdiction. In practice, Guatemala has imposed such requirements by a declaration under the Convention.[26] It is under this exception that a clause that refers to a provision in investment agreement that allows the disputing parties to choose among various options of dispute resolutions or requirement to resort to local remedies are exercised.

Fourth, ICSID has a unique feature of institutional support. ICSID provides institutional support in the selection of arbitrators and the conduct of arbitration proceedings. The Convention establishes the Centre endowed with separate

[24] *Ibid*.
[25] Lukas Mistlis, International Investment Arbitration Substantive Principles, Oxford International Arbitration Series, 2nd ed., Oxford University Press, (2017), p.302.
[26] Ibid.

international legal personality.[27] While the parties are relatively free to agree on any procedural rules for the conduct of their proceeding, rules have been promulgated which applies automatically to the extent that the parties fail to agree on any procedural points. Thus, such disagreements will not prevent the initiation or progress of a proceeding. For example, arbitration proceedings are to be conducted per the Convention and, except as the parties otherwise agrees under the arbitration rules in effect on the date on which the parties consented to arbitration. The Centre's administrative council adopts the arbitration rules.

Fifth, ICSID created the novel feature of a tribunal in which the foreign investor has standing. Previously, bringing a claim against a state by an individual investor to an international forum was unthinkable.[28] The Convention not only allows a private claimant to bring a claim without espousal by national state, but the national state expressly abandons its power of diplomatic protection.[29] This principle could be considered as being inconsistent with traditional international law where wrong is done to a national of one state for which another state was internationally responsible is actionable, not by the injured national, but by his state. The Convention filled that gap, and by doing so recognized individuals as a subject of international law.

Finally, ICSID has also a unique feature in terms of enforcement mechanism. Articles 53, 54, and 55 address peculiar aspects of recognition and enforcement of an award rendered under the Convention. The ICSID award has a binding force and it is final. Accordingly, each disputing party must abide by and comply with the terms of the award without the possibility of an appeal. Besides, all contracting states of the ICSID should recognize the award and enforce it as if the award were a final judgment of a domestic court. Hence, the award of ICSID is final which is not subject to domestic court scrutiny and has enjoyed wider enforcement opportunities all over the contracting countries' territories.

1.3. The ICSID's Jurisdiction

ICSID is one of the few institutions with specialized subject-matter jurisdiction. The focus of ICSID’s jurisdiction is exclusively on disputes arising from international investment. Article 25(1) of the ICSID Convention provides:

[27] ICSID Convention, *supra* note 5, Arts. 1 and 18.
[28] Wick, Diana Marie, The Counter-Productivity of ICSID Denunciation and Proposals for Change, *Journal of International Business & Law,* vol. 11, no. 2, (2012), p. 256.
[29] Ibid.

> *The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.*

There are two conditions where the jurisdiction of the ICSID is established. The first condition is the state party to the dispute, i.e., the host state and the home state of the investor must be contracting states to the ICSID Convention. The investor may be an individual (natural person) or a company or similar entity (juridical person) so long as the nationality requirement envisaged under the convention is meet. In addition, there is what is called a negative nationality requirement: the investor must not be a national of the host state. The second condition is the host state and the investor must give consent in writing to submit their case to the Center.[30] Thus, participation in the ICSID Convention does not constitute by itself submission of the upcoming cases to the Centre's jurisdiction. The Convention would rather require the separate written consent of the parties. Such consent may be either given in a direct agreement between the investor and the host State such as a concession contract, or based on an offer by the host state that may be accepted by the investor in the appropriate forum such as state's investment laws. A standing offer may also be contained in a treaty to which the host State and the investor's state of nationality are parties. Most bilateral investment treaties contain clauses offering access to ICSID to the nationals of the parties to the treaty.

Concerning the cause of action, ICSID jurisdiction is restricted only to "any legal dispute directly related investment".[31] However, the concept of "investment" is not defined in the ICSID Convention. During the Convention's drafting, there was an attempt to put a definition but eventually not included in the Convention. One of the main reasons for resisting a definition of investment in the Convention was the fear that it could give rise to lengthy jurisdictional discussions even if the parties' consent to submit a dispute to ICSID was well established.[32] However, recently, many bilateral investment treaties and multilateral treaties contain definitions of "investment".[33] In practical cases, the

[30] ICSID Convention, *supra* note 5, Art. 25.
[31] Id., Article 25, Para, 1.
[32] Subject matters of ICSI, available at http://icsidfiles.worldbank.org/icsid/icsid/staticfiles/basicdoc/parta-chap02.htm, last visited 12 July 2020.
[33] See USA Model Bilateral Investment Treaty Concerning the Encouragement and Reciprocal Protection of Investment (2012), Art. I, 2012, *available at*

concept of investment under the ICSID Convention has been given a wide meaning by tribunals. Varieties of activities in a large number of economic fields have been accepted as investments.[34] For example, in *Salini Vs. Kingdom of Morocco* case, the decisive criteria applied by tribunals to judge as an investment are a substantial commitment, duration, the presence of economic risk as well as relevance for the host state's development.[35] The arbitral tribunal mentioned several criteria for the term "investment" under the ICSID Convention as it states:

> *[t]he doctrine generally considers that investment infers contributions, a certain duration of performance of the contract and participation in the risks of the transaction [....] in reading the Convention's preamble, one may add the contribution to the economic development of the host state of the investment as an additional condition.*[36]

From the judgment of the tribunal, one could observe that, in conceptualizing the notion of investment, the contribution of the activity to the economic development to the host state is regarded as an additional condition.[37] Moreover, cases that are going to be submitted to the ICSID need cause of action. In this regard, the Report of the Executive Directors stated that the disputes "must concern the existence or scope of a legal right or obligation or the nature or extent of the reparation to be made for breach of a legal obligation."[38]

2. The ICSID from the Perspective of Developing Countries

ICSID is an intergovernmental institution designed to promote the settlement of disputes between states and private foreign investors and enforcement of an award that reduces the risk of investment. The ICISD system is a product of mutual compromise that the host state submits the power of exercising settling over disputes with foreign investors in return for promotion of economic development with the belief that protecting foreign investors would facilitate investment and ultimately enhance economic development in developing countries. In this regard, there are benefits to developing countries.

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*h*ttp://www.state.gov/documents/organization/188371.pdf)., last visited 01 October 2020. The U.S. Model BIT defines an investment as "every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk."

[34] Christoph, *supra* note 18, P.14.

[35] Ibid.

[36] SaliniConstruttori, (SpA and ItalstradeSpA vs Kingdom of Morocco), ICSID Case No.ARB/00/4), (Decision on Jurisdiction (2001), ICSID Reports 400, Para 52.

[37] ICSID *supra* note *5*, Art. 26.

[38] Subject matter jurisdiction of ICSID, *supra* note 32.

Even though there is no empirical evidence to prove that ratification led to an increased FDI, ICSID is an important part of a favorable regulatory system for international investors as it provides appropriate dispute resolution frameworks. Institutionally, the Secretariat of the ICSID carries out several functions that may benefit developing countries. The Secretary-general plays the gate-keeping function by screening claims brought by investors to ensure that illegitimate claims are not filed against them. Unlike other arbitral tribunal, 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.[39] This looks significant as the majority of ICSID claims are lodged against developing countries by developed countries as is discussed in the following sections.

Besides, ICSID standard clauses and rules of procedure provide institutional support for the conduct of proceedings, assures the non-frustration of proceedings, and facilitates the award's recognition and enforcement. Consequently, ICSID improves the investment climate in developing countries and enhance foreign investment in the host state. This article acknowledges the difficulty that may be associated with the determination of the degree that ICSID contributes in attracting international investment, but contends that an independent dispute settlement mechanism is one of the strongest incentives for the protection of foreign investment in the host state.

As stated before, ICSID is designed to restore investors' confidence and promote foreign investment.[40] It is unlikely that a foreign investor will engage in FDI in the host State without concrete assurances of protection of foreign investment. Among others, consenting to ICSID jurisdiction is a means by which the foreign investor can enforce his substantive and procedural rights against the host State.[41]According to the ICSID Report, guaranteeing investment protection by providing a mechanism for investor-state arbitration "would provide additional inducement and stimulate a larger flow of private international investment into

[39] 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), pp. 172–191.

[40] Felix O. Okpe, Endangered Element of ICSID Arbitral Practice: Investment Treaty Arbitration, Foreign Direct Investment, and the Promise of Economic Development in the Host States, *Richmond Journal of Global Law and Business* Vol.13, No.2, (2014), p.244.

[41]Ibid.

its territories, which is the primary purpose of the Convention.[42] Yet, the protection of foreign investment is not the only factor that may stimulate FDI. Potential foreign investors may also consider economic and political factors like market size, production costs, and political stability of the host state.[43]

Besides, by consenting to ICSID arbitration the host State shields itself against diplomatic protection and ad-hoc arbitrations.[44] Diplomatic protection and ad-hock arbitration have limitation compared with ICSID. Diplomatic protection is discretionary and the investor does not have an automatic right to employ this method of resolution.[45]Additionally, diplomatic protection can potentially affect the political relations between the two countries involved in the dispute and changes the investor-state dispute to a political dispute between the host country and the home country, and may result in intense international relations. Concerning ad-hock arbitration, it is not supported by a particular arbitration institution, which creates several procedural disadvantages and inefficiencies. Among other things, the parties are required to create an arbitration agreement that regulates several procedural issues including location, the language of arbitration, and selection of arbitrators.

Despite the growing participation of states in ICSID, there is also a growing concern that the Center inequitably prioritizes the protection of investors' rights regardless of any potentially adverse consequences on the developing countries.[46] There is often a criticism that, as a part of the World Bank, in investment disputes, the ICSID has favored multi-national corporations. In this regard, The UNCITRAL Rules provide some advantages to states. If the arbitration is conducted under UNCITRAL Rules, rather than under ICSID, the World Bank cannot use its influence to prevent a recalcitrant country from obstructing the arbitration process.

Since developing countries have a concern on the legitimacy and impartiality of the international investment dispute settlement process in general and the ICSID in particular they will seek ways to avoid the international investment regime.[47]

[42] Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 5 I.L.M. 524 12 (Mar. 18, 1965).
[43] Ibid.
[44] Ibid.
[45] United Nations Conference on Trade and Development, New York and Geneva, *Course on Dispute Settlement: International Centre for Settlement of Investment Disputes*, UNCTAD/EDM/Misc.232, Module 2.1 (Oct. 3, 2003) available at http://www.unctad.org/en/docs/ edmmisc232overview_en.pdf last visited 27 October 2020.
[46] Wick, *supra* note 28, p.240.
[47] Ibid.

For example, the withdrawal of Latin American countries, such as Bolivia, Ecuador, and Venezuela from the ICSID's membership signals that changes are imperative to fix the problem of the current international investment regime.[48] Also, Professor Paul Szasz, a former Secretary-general of the ICSID**,** identified the main reasons why Latin American countries had yet to adhere to the Convention; they feared that by adopting the Convention they would be undermining the well-established principle of international law of no-intervention.[49]

The concern of developing countries is also further substantiated when one assesses case statistics of ICSID and additional facilities. In this respect, developing countries, which are the major global net capital importers, are the first to bear the heavy responsibility of confronting growing investment agreement complaints before ICSID arbitration and its additional facilities. For example, among 613 cases registered in ICSID and its additional facility Rules, 275 cases relate to developing countries in Africa and Latin America alone, which accounts for 45% of the caseload. One hundred and thirty-five (135) of these cases (22%) involved African State Parties.[50] Of 135 cases of the ICSID involving African State Parties, 123 were commenced under the ICSID Convention, while the four cases were initiated under the additional facility rules. Latin America accounts for 23% of the total caseload (140 cases). When we see individual countries, Argentina alone faced an incredible 54 ICSID complaints and Mexico faced 17 ICSID complaints.[51] Be the above as it may, in the next section the author discusses the major critics forwarded by developing countries against ICSID.

2.1. Consent to the ICSID Arbitration and the Exclusion of National Courts

One of the critics forwarded by developing countries is that ICSID is outsourcing the countries' judicial authority and threatening the national sovereignty of the host state. However, it has to be noted that this critic is not peculiar to ICSID, but a concern arises across the board to all investor-state arbitration. As indicated before, investment claim brought under the provision of the Convention shall, unless otherwise stated, be construed as granting consent to such arbitration to the exclusion of any other remedies. Thus, consent to

[48] Ibid.
[49] Vincentelli Ignacio, The Uncertain Future of ICSID in Latin America, *Law and Business Review of the Americas*, Vol. 16, No. 3, (2010), p. 449.
[50] International Investment Dispute, available at https://icsid.worldbank.org/en/Pages/about/Member-States.aspx# last visited on 20 September 2020.
[51] Vincentelli, *supra* note 49, p. 449.

arbitration excludes the national courts' role from the settlement of investment disputes. To this effect, an annulment committee of ICSID in the *Helnan vs. Egypt* case explains how consent to arbitration excludes the role of national courts as follows:

> *… the contracting states agreed upon a fundamental reversal of local remedy rule as it applied in customary international law unless the relevant state expressly imposed such a condition. Article 26 create[s] a rule of priority vis-à-vis another system of adjudication to avoid contradictory decisions*.[52]

Therefore, the contracting state cannot require the exhaustion of local administrative or judicial remedies unless there is a limit in otherwise agreement. Such limited exception may apply in cases where the state has given its consent to arbitration under the condition of the exhaustion of local remedies as provided under Article 26 of the ICSID Convention.

The practice of Latin American countries has also demonstrated the existence of these problems. They were at the beginning suspicious of arbitral proceedings as opposed to judicial proceedings, primarily because ICSID's jurisdiction threatens state sovereignty.[53] In addition, Latin American states continue to express dissatisfaction after the convention enters into force. For example, on May 11, 2008, the then Ecuador's President Rafael Correa publicly stated "we had no confidence in the World Bank arbitration branch (ICSID) that is hearing U.S oil company Occidental's lawsuit against Ecuador. Ecuador handed over its sovereignty when it signed international accords binding it to the Bank's ICSID''.[54]

Moreover, the constitution of Bolivia, which is enacted after its withdrawal from the ICSID, shows the dissatisfaction of the country against the jurisdiction of the Center. Accordingly, under Article 366, the new constitution states that "…foreign companies will not be able to sue Bolivia in any foreign jurisdiction nor resort to international arbitration or diplomatic protection."[55] This provision

[52] *Helnan international hotel AS Vs. Egypt*, A decision on annulment, *ICSID Case No ARB/*05/19, IIC, (2010), P.40.

[53] Vincentelli, *supra* note 49, p. 419.

[54] Gabriela Molina, *Ecuador Wary of World Bank Arbitration in Occidental Case,* USA today, May 11, 2008**,** http://www.usatoday.com/money/economy/2008-05-11-3404362337_x.htm, last visited on 10 October 2020.

[55] Fernando Cabrera, *Bolivian Voters Approve New Constitution as Government Continues to Nationalize Oil Assets,* INv. TREATY News, Feb. 4, 2009,http://www.investmenttreatynews.org/cms/news/archive/2009/02/04/bolivian-voters-approvenew-constitution-as-government-continues-to-nationalize-oil-assets.aspx 10 October 2020.

shows Bolivia's refusal to appear before ICSID and its choice for local courts. The same worry was mentioned in Venezuela's withdrawal from ICSID. In this regard, Venezuela explicitly criticized the ICSID system saying that accession to international conventions is made under pressure from transnational economic sectors that resulted in dismantling Venezuela's national sovereignty.[56]

Furthermore, ICSID has also rules which require the automatic recognition and direct enforceability of ICSID awards. Accordingly, the rules delocalized ICSID awards from the reach of the domestic system. The ICSID system excludes domestic courts not only from the exhaustion of local remedies but also excludes domestic courts from overseeing the recognition and enforcement of awards. According to article 54 (1) of the ICSID Convention, each state party to the Convention "shall recognize an award […] as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that state.''[57] Even the recognition and enforcement may be sought either in the host state, in the investor's state, or in any state that is a party to the ICSID Convention with no domestic court scrutiny.[58] Thus, national courts are excluded from questioning the binding nature of the award and must enforce the pecuniary obligations imposed by it, without any further legal recognition scrutiny.[59] On this issue, the worries of developing countries are more than developed countries mainly for two reasons. First, the parties to the dispute are not on equal footing. This is a dispute where powerful investors from developed nations claim action against developing nations and the investor is nearly always the claimant.[60] Second, ICSID has an affiliation to the World Bank where developed nations play a dominant role.

3.2. Final Award with No Appeal

Under the ICSID system there is no an appellate body to review the decision of the arbitral award. In fact, under the ICSID procedure, *an ad hoc committee* may annul the award upon the request of a party.[61] However, as distinguished from an appeal, an annulment is concerned only with the legitimacy of the process of the decision but not with its substantive correctness.[62] Annulment merely

[56] Vincentelli, *supra* note 49.
[57] ICSID Convention, *supra* note 5, Art.54 (1).
[58] *SOABI v Senegal*, French Court of Cassation 30 ILM 1136, (1991), Para.108.
[59] ICSID Convention *supra* note 5.
[60] For example, among 129 recorded ICSID cases that have involved Africa countries, 126 had States as respondents while in only three cases African parties are the claimant. See also Bryan Cave LLP International Investment Arbitration in Africa: Year in Review (2016), Pp 2-6.
[61] Christoph, *supra* note 7.
[62] ICSID Convention, *supra* note 5, Art. 52.

removes the original decision without replacing the merit to the award. To receive a valid award for that particular claim, the parties must request that the dispute be submitted to a new tribunal which is more time and resource consuming for developing countries.

Moreover, the grounds for annulment under the ICSID Convention are listed exhaustively in Art. 52(1). According to the Convention, the decisions of the tribunal will be annulled in case where the tribunal was not properly constituted, the tribunal has manifestly exceeded its powers, there was corruption on the part of a member of the Tribunal, there has been a serious departure from a fundamental rule of procedure, and if the award has failed to state the reasons thereof. However, improper application of the law is not considered as a reason for annulment.[63] Therefore, the aggrieved party may not rely on errors in the application of the proper law even if it leads to an incorrect decision.[64] As a result, there is currently no cure for an award decided on a substantively invalid basis.

2.3. The Cost of Arbitration is Onerous

The cost of ICSID arbitration is extremely high. The costs of a particular proceeding consist of the charges for the use of the facilities and expenses of ICSID, the fees, and expenses of the arbitrators, and the expenses incurred by the parties in connection with the proceedings. The average cost of ICSID arbitration is 4 million US dollars, and in some cases even exceed 40 million US dollars.[65] This is costly and it is very disturbing because the rules on how to share the costs between the parties to the dispute are very flexible. Mostly, both investors and the host country face uncertainties. So, the high costs and uncertainties in cost allocation make ICSID a weapon whereby the foreign investors threaten developing countries given their limited resource at disposal. Besides, as investors continue to be successful in securing monetary awards through the arbitration process, the number of cases is rising significantly.[66]

[63] Tekalegn, Evaluating Investor-State Dispute System under Ethiopia's Bilateral Investment Treaties: Looking a Workable Road-map, *Beijing Law Review*, Vol. 10, (2018), pp.115-130.
[64] Id., p.123.
[65] Carlos G. Garcia, All the Other Dirty Little Secrets: Investment Treaties, Latin America, and the Necessary Evil of Investor-State Arbitration, *Florida Journal of International law*, Vol.16, (2004), P.301.
[66] Ibid.

Some studies indicated that in 70% of the public decisions addressing the merits of the dispute, investors' claims were accepted, at least in part.[67] Investors from developed countries against developing countries file the vast majority of new cases.[68] As the high cost of arbitration is an advantage for a party with stronger economic strength, and it cannot reflect the fairness and reasonableness of the dispute settlement mechanism.

In addition, the cost associated with ICSID is increasing because of the significant financial charges for that goes to arbitrators.[69] Unlike judges, arbitrators do not earn a flat salary and therefore, have a financial stake in the arbitration system.[70] Arbitrators' fees can range anywhere from $375 to $700 per hour.[71] Earnings could be far greater depending on where the arbitration takes place, the case's length, and the case's complexity.[72] However, the amount of fee that an arbitrator earns on a particular case is potentially correlated to the cost the disputing parties must pay. In this regard, a closer look into the ICSID's award against some Latin American countries helps to understand the cost of choosing ICSID. For example, in a case between Pernoco Vs. Ecuador, the tribunal awarded the US company US$ 449 million as compensation for Ecuador's violation of the Participations Contracts and the BIT.[73] This expensive investment arbitration award could, thus, affect the annual budget of a country in most developing countries.

2.4. Lack of Transparency in ICSID and the Dilemma Faced by Developing Countries

Arbitration is generally known for secrecy, and investor-state arbitration is no exception. While confidentiality suits commercial arbitration well, the same standard may not be appropriate in investor-state arbitration where tribunals are frequently required to balance investment protection with the varied public interest. Proceedings involving public interest by its nature need not be

[67] United Nations Conference on Trade and Development, Recent Developments in Investor-State Dispute Settlement (ISDS), (2013) *available at* http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf last visited 16 May 2020.
[68] Carlos, *supra* note 65.
[69] Pia, *supra* note 9, p.35.
[70] Ibid.
[71] Ibid.
[72] Ibid.
[73] Daniela Páez-Salgado, Perenco v Ecuador: An Example of a "Lengthy, Complex, Multi-faceted, Hard Fought and Very Expensive" Investment Arbitration, available at https://www.iisd.org/itn/en/2017/09/26/icsid-tribunal-awards-roughly-usd380-million-compensation-illegal-expropriation-ecuador-matthew-levine/ last visited 10 November 2020.

confidential. Therefore, it is sometimes inappropriate to conduct confidential arbitrations involving public interests.[74]

The ICSID's Arbitration rules create a presumption in favor of confidentiality.[75] Only the members of the tribunal, the parties, and the parties' agents, counsel, witnesses and experts may be present at the hearings. According to the ICSID Convention, the tribunal is prohibited from publishing the award without the consent of the parties.[76] By choosing arbitration, as opposed to judicial proceedings, parties have rejected public courts and have elected to keep their dispute private. One of the primary reasons parties claim they elect to settle their dispute through arbitration is of course confidentiality protection.[77] In addition, many foreign investors claim that confidentiality is necessary to protect intellectual property, trade secrets, or business information that may be disclosed as part of the arbitration proceedings.[78] To some extent, the 2006 amendments to the ICSID Convention Rules improved transparency by permitting third parties to attend hearings and publication of the award, but the new rules are dependent upon the consent of the parties.

Generally, several commentators and those states that have recently denounced ICSID have criticized the emulation of the private and confidential model dispute settlement for different reasons. First, investor-state arbitration is different from commercial arbitration. Investor-state disputes, compared to the traditional international commercial arbitration, justify the need for transparency for the arbitration proceedings and award. Unlike the traditional international commercial arbitrations, investor-state disputes involve governments as parties to the dispute. The disputes often involve public interests because their subject matter affects the provision of public health, human rights, environment protection, and labor standard. Thus, in the investment disputes, the public has an interest in assuring that decisions are made using proper procedures and taking due account of public interests.

[74] Benjamin H. Tahyar, Confidentiality in ICSID Arbitration after AMCO Asia Corp. v. Indonesia: Watchword or White Elephant? *Fordham International Journal of Law,* Vol.93, No.10, (1986),p.37.
[75] ICSID Secretariat, Possible Improvements of the Framework for ICSID Arbitration 8 (Discussion Paper, 2004), *available at* https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/Possible Improvements of the Framework of ICSID Arbitration. Pdf, last visited 2 April 2020.
[76] ICSID, Rules of Procedure for Arbitration Proceedings, R.6(2), (11965), *available at* https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/ CRR_English-final.pdf last visited 16 April 2020.
[77] Amanda Norris & Katrina Metzidakis, Public Protests, Private Contracts: Confidentiality in ICSID Arbitration and the Cochabamba Water War', *Harvard Negotiation Law Review*, Vol. 31, No., 47, (2010), p.46
[78] Ibid.

Secondly, the lack of transparency highly affects the predictability of an award. The requirement that an award shall not be published without the consent of the parties will limit the public's access to the award.[79] Without access to prior award information and with no precedent, it is difficult for developing countries to predict the outcome of their dispute. Moreover, when awards are not published, it is difficult to analyze how the law is applied.[80] This, in turn, harms the credibility of the institution itself by developing countries that usually do not have appropriate experience ahead of a dispute. Most of all, due to ICSID's structure and association with the World Bank, which has close relations with large corporations, developing countries are skeptical of the tribunal's reliability in rendering an objective decision.[81]

Lastly, foreign governments' big corporations may also use confidential proceedings to conceal any abuse of the system. Confidential arbitration proceedings, in an environment where the risk of corruption is allegedly prevalent, raise the possibility of illegal practices and fraud between governments and foreign companies.[82] On this issue, Elizabeth Maul stated that ''in the past six years, the World Bank received more than 2,000 allegations of corruption and found a recurring pattern of bribery and kickbacks. The writer argues that investors could use their rights to conspire with governments to force dangerous investments on unwilling populations.[83] Not only this, confidentiality can also protect arbitrators by concealing the proceedings and awards from public scrutiny.

However, high level of transparency is not also necessary in the interest of most developing countries' governments. Indeed, they have a huge domestic pressure on them to publicize the proceedings. Thus, in addition to being beneficial to the investors' interests, confidentiality may also be in the states officials' best interests because of their fear of potentially embarrassing conduct by some officials. Thus, the political figures may sometimes want confidentiality in investor-state arbitration. But, this is not in the interest of the public as an investment dispute involves a great deal of environmental, human rights, and labor issues.

[79] Benjamin, *supra* note 74.
[80] Elizabeth, *supra* note, p.885
[81] Amanda, *supra* note 77, p.63.
[82] Elizabeth, *supra* note 21, p. 908.
[83] Ibid.

3. The BITs of Ethiopia and Reference to ICSID.

3.1. Ethiopia's Role during ICSID Negotiation

Ethiopia had participated in the drafting of the ICSID convention in 1960 and even hosted a round of negotiations in Addis Ababa.[84] Nonetheless, Ethiopia has not yet ratified the ICSID Convention and the country is still only a signatory to it.

To date, it is hard to know the official justification of why the country chooses to stay outside the ICSID system. However, the statements made by Ethiopia's representative during the drafting of ICSID give some clues. As a matter of principle, Ethiopia favored the establishment of the International Conciliation and Arbitration Center. Ethiopia's representative had argued for the Center saying that ''the investor would always regard courts as the instrument of the State. On the other hand, States might be reluctant to take action against investors because of the unfavorable impression such action might make on others''.[85] According to the representative's opinion, the proposed Center would be of value in improving relations between investors and governments.

Ethiopia had also raised some concerns. The first concern was about the ICSID's administrative council affiliation to the World Bank. Ethiopia pointed out that the president of the World Bank should not be entitled to nominate the Secretary-general on which developing countries are hardly represented.[86] The Secretary-general of the ICSID must therefore be fully independent of the influence the of the World Bank president since the nomination would give a sort of veto power to the president over the Administrative Council.[87]

Moreover, Ethiopia had raised its concern over the jurisdiction of the Center. Ethiopia proposed to limit the scope of the Center only to disputes specifically listed and to set a lower limit for the value of the subject matter of dispute in cases of claims of a financial nature.[88] However, the proposal was rejected saying that to limit the scope of the Center only to disputes specifically listed would unduly affect the free choice of states. States which did not wish to

[84] UNCTAD Series on Issues in International Investment Agreements II; United Nation, (2011), pp 24-27.
[85] History of ICSID, Vol.2, part.1, vailable a thttps://icsid.worldbank.org/sites/default/files/publications/History%20of%20the%20ICSID%20Convention/History%20of%20ICSID%20Convention%20-%20VOLUME%20II-1.pdf , last visited 27 October 2020.
[86] Id, p.245.
[87] Ibid.
[88] Id., p.253.

submit certain disputes to conciliation or arbitration could freely do so by withholding their consent.

Although Ethiopia is not a party to the Convention, most of its BITs contain clauses that refer to the jurisdiction of ICSID. Ethiopia has signed more than thirty-three BITs over the past two decades.[89] To the best knowledge of this author, all Ethiopia's BITs except BITs with Libya, Brazil, Russia, and Netherland, submit to ICSID's jurisdiction upon different conditions.[90] Thus, it is imperative to explore the essence of referring to ICSID jurisdictions amid the limitations mentioned in the previous sections. In this section, the author has discussed selected Ethiopia's BITs that refer to the ICSID.

3.2. The Preconditions in Refereeing to the ICSID Jurisdiction

Before taking the matter to ICSID, countries may make their consent conditional upon resort to amicable means, exhaustion of local remedies or limit the power of the Center to a certain class of disputes. In this respect, Ethiopia's BITs exhibit different features.

Firstly, all Ethiopia's BITs have put a requirement to resort to an amicable settlement of disputes between the host state and the investors. However, recourse to amicable means of dispute settlement is not a mandatory requirement. The requirement is qualified by the phrases such as, 'as far as possible', 'to the extent necessary' or 'when available'.[91] Hence, before resorting to ICSID jurisdiction, parties to the dispute are not necessarily under obligation to try amicable means. In the vast majority of the BITs, the disputing parties have no mandatory obligation to try amicable means.[92]

Second, almost all the BITs in which Ethiopia is a party or signatory provide a six-month time limit before the dispute is submitted to ICSID arbitration or other competent authorities. In the absence of an amicable settlement by direct agreement between the parties to the dispute within six months from the

[89] International Bilateral Treaty Navigator, list of Ethiopia's Bilateral Investment treaty with *Supra* note available at https://investmentpolicy.unctad.org/international-investment-agreements/countries/67/ethiopia last visited 27 October 2020.

[90] *Ibid.*

[91] For example, Article 11 (1) of Ethiopia- Belgium-Luxemburg provides that as far as possible, the Parties shall endeavor to settle the dispute through negotiations, if necessary by seeking expert advice from a third party.

[92] The BIT with Denmark (Article 9(1)), Egypt (Article 9), Germany (Article 11(1), South Africa (Article 7(1), Sweden (Article 8(1)**,** UK (Article 8(1))**,** Yemen (Article 9), Tunisia (Article 7) and France (Article 9) employ simple amicable means. Whereas the BIT with China (Article (9(3)), Belgium-Luxemburg (Article 11(1)), and Israel (Article 8(1) use a more clear and direct term of 'negotiation'. The BIT with Austria, under Article 12(1)) uses the term negotiation or consultation.

notification, the dispute shall be submitted either to the competent jurisdiction of the state where the investment was made or to international arbitration. The only exceptions are the BITs with the UK and Finland, both of which provide a shorter period. According to Article 8(1) and Article 9(1) of Ethiopia's BIT with the UK and Finland respectively, if the dispute has not been settled within three months from the date on which it was raised in writing, the dispute may be submitted to ICSID.

The third issue worth discussing is which parties are allowed to submit to the ICSID. In this regard, BITs have taken a different position. The majority of the BITs have singularly given the option to investors.[93] Hence, if any dispute should arise between Ethiopia and an investor of the other contracting party and not settled amicably, then the investor affected has the option to take the dispute before a competent court or international arbitration. Where the investor opted to refer the dispute to international arbitration, an *ad hoc* arbitral tribunal set up according to the arbitration rules laid down by the United Nations Commission on International Trade Law (UNCITRAL), ICSID, ICSID additional facilities or the International Chamber of Commerce are frequent choices mentioned in almost all Ethiopia's BITs.

The BITs with China, Egypt, and UAE have adopted somehow a balanced approach. In those treaties, if the dispute cannot be settled within six months after resort to a court or administrative tribunal, either party to the dispute shall be entitled to submit the dispute to the national or international arbitration.[94] In summary, in the vast majority of the BITs, investors enjoy the power to choose either a domestic court or international arbitration among international arbitrations. Conversely, Ethiopia, as a host state in most of the cases, does not have such options.

3.3. The Scope of Reference to ICSID: Consent or Agreement to Consent?

Scholars have differing opinions on whether an ICSID arbitration clause in a BIT is consent to ICSID jurisdiction or merely an offer to consent. Aron Brochures said that the consent contained in a BIT is a mere offer to consent subject to acceptance by the investor.[95] Other scholars like Professor Gaillard

[93] Ethiopia's BIT with Belgium-Luxemburg, Algeria, Austria, Denmark, France, Germany, India, Iran, Israel, Kuwait, Malaysia, South Africa, Spain, Sudan, Sweden, Turkey, UK, Switzerland, Yemen, and Tunisia left the issue to investors' choice.

[94] Article (9)(3) of Ethiopia-China BIT, Article (8(2) of Ethiopia-Egypt BIT, and Article (15(2) and (15(3) of Ethiopia- UAE BIT.

[95] Wick, *supra* note 28, P. 257.

look at the language of the arbitration clauses. He argues that consent contained in BITs should be divided into "unqualified consent" and "agreements to consent"'.[96] Gaillard contrasts the language in BITs and concludes that the wording "shall" constitutes unqualified consent and the wording "may" constitute an agreement to consent.[97] In this author's opinion, the latter argument is sound and in line with the normal usage of language in the law. BITs are usually entered into between countries that speak different languages; thus, different conclusions may be reached depending on how the language is used.

Coming back to the point, different BITs in Ethiopia has adopted different terminologies. Some of the BITs have adopted more clear language while others prefer vague and ambiguous clauses. To begin with, Ethiopia-Denmark BIT under Article 9(2) provides:

> *where the dispute is referred to international arbitration, parties in the dispute may agree to refer the dispute either to the ICSID provided both contracting parties are parties to the said Convention; or additional facility rules, if one of the contracting Parties is not a Contracting State of the Convention; or an international ad hoc tribunal established under the UNCITRAL.*

Demark-Ethiopia BIT is relatively balanced mainly for three reasons. First, the choice to submit a dispute to a different forum is left for the parties' agreement.[98] Second, this is in line with article 25(1) of the ICSID Convention that the jurisdiction of the center is conditional upon state membership to the Convention. Finally, yet importantly, the BIT contains a long list of alternatives along with ICSID, and therefore, depending on the nature of the dispute, the parties could have many choices. Ethiopia's BIT with Egypt,[99] UAE,[100] and the UK[101] follow the same approach.

Ethiopia and Belgium-Luxemburg BIT has adopted a different position. First, the dispute shall be submitted, at the option of the investor, either to the competent jurisdiction of the State where the investment was made or to international arbitration.[102] Here, the host state does not have the same power to choose between competent domestic jurisdiction and international arbitrations.

[96] Ibid.
[97] Ibid.
[98] Article (9(2)) of Ethiopia-Denmark BIT.
[99] Article 8(2) of Ethiopia-Egypt BIT.
[100] Article 15(4) of Ethiopia-UAE BIT.
[101] Article 8(3) of Ethiopia-UK BIT.
[102] Article 11(2) of Ethiopia-Belgium-Luxemburg BIT.

Second and most importantly, each Contracting Party agrees in advance and irrevocably to the settlement of any dispute by either ICSID or other types of arbitrations listed in the BIT.[103] Thus, consent contained in Ethiopia and Belgium-Luxemburg BIT is unqualified consent that does not require the further agreement of parties. It is clearly stated that the two parties already have consented to the jurisdiction of ICSID if both of them have become a party to the said Convention. Moreover, the delocalization of investment cases from the reach of the domestic court is expressly acknowledged in this BIT. To this end, both parties waive the right to take the dispute to all domestic administrative or judiciary remedies to be exhausted by consenting to the ICSID.[104]

The third BIT selected for discussion is the Ethiopia-Israel BIT. The scope of expression of consent is clearer and more unconditional under Ethiopia-Israel BIT. According to Article 8(3) of the BIT, ''[e]ach Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration under the provisions of this Article''. The BIT unequivocally underlined that the parties to the Convention have given consent and further negotiation is not a requirement. The condition provided in *the BIT* is *that* ICSID is an option if both contracting parties are parties of ICSID Convention and that an additional facility is an option if only one state is a party to the ICSID Convention. Like many other BITs, the investor, not the host state, has a choice to submit the dispute to a competent court of the host state or a list of international arbitration tribunals including ICSID.[105]

Fourth, in Ethiopia and France BIT, any dispute concerning the investments occurring between one Contracting Party and a national or company of the other Contracting Party shall be settled amicably between the two parties concerned.[106] If the dispute has not been settled within a period of six months from the date either Party to the dispute requested amicable settlement, the dispute shall at the request of the national or the company concerned is submitted to arbitration or adjudication. The dispute could be submitted to a competent court of the Contracting Party; or ICSID if the Contracting Party, a party to the dispute has acceded to it; or the Additional Facility; or an international ad hoc arbitral tribunal under the Arbitration Rules of the United Nations Commissions on International Trade Law (UNCITRAL).[107]

[103] Ibid.
[104] Ibid.
[105] Article 8(2) of Ethiopia-Israel BIT.
[106] Article 9 of Ethiopia-France BIT.
[107] Ibid.

In terms of word usage, Ethiopia and France BIT employs "shall" which implies the host state has consented to settle investment disputes either by a competent court or other international arbitration, ICSID included, upon the request of the investor concerned. However, the BIT has not made ICSID jurisdiction conditional upon the accession of both parties to the convention. According to the BIT, if the party to the dispute acceded to the ICSID Convention, the dispute shall at the request of the national or the company concerned be submitted to the center. Thus, a dispute could be submitted to ICSID if the Contracting Party, a party to the dispute, has become a party to ICSID convention. This creates ambiguity and vagueness in the interpretation. It neither uses the statement where both Contracting Parties are members of the Convention nor the BIT even says contracting parties. The issue seems intentional when looking into the way Article 9(c) is structured. Overall, the additional facility is available only if one of the Contracting Parties is not a Contracting State of the Convention. For example, Article 11(2) (b) of Ethiopia-Germany BIT clearly provides a resort to the Additional Facility be made only when at least one of Contracting Party is a member of the Convention, but not both.[108] However, in Ethiopia-France BIT this is not a requirement. Consequently, one cannot interfere with Article 9(c) that ICSID is available if both states are parties to the ICSID Convention and then the additional facilities are available in both states are not parties to the convention.

To sum up, the way consent to ICSID jurisdiction is expressed in Ethiopia BITs is not uniform. In some of the BITs, expressions of consent to ICSID jurisdiction are perfect and complete. They are sufficient to assert the jurisdiction of the ICSID; if the investor chooses ICSID, the state's consent contained in the BIT is enough to establish jurisdiction. Other categories of Ethiopia's BITs contain clauses that provide consent to agree to ICSID jurisdiction. In those BITs, the host state and the investor are required further agreement to consent to the jurisdiction of ICSID.

3.4. Submission to ICSID Arbitration and the Exclusion of Exhaustion of Local Remedies

In the previous section, it has been discussed that consent to ICSID arbitration excludes national courts unless the contracting state may notify ICSID of any class of disputes that it would not consider submitting to ICSID jurisdiction[109] or a Contracting State may, as a condition of its consent to ICSID arbitration, insist

[108] Article 11(2)(d), Ethiopia -Germany BIT.
[109] ICSID Convention, *supra* note *5 Art. 25(4).*

that the parties exhaust local remedies first.[110] With this in mind, this author has analyzed whether either of these conditions is enshrined in Ethiopia's BIT. The analyses revealed that except BITs with China and Tunisia, none of Ethiopia's BITs reference to ICSID jurisdiction excludes certain classes of disputes. Nor exhaustion of local remedies is a requirement. Here, the author would like to mention Ethiop-Germany as an example. Ethiopia-Germany BIT has expressly excluded the requirement of exhaustion of local remedies. According to Article 11(3) of Ethiopia-Germany BIT, the investor is not under obligation to exhaust remedies available in competent courts in Ethiopia before submitting the case to ICSID. In case the investors choose to submit the dispute to the local court of the host state, the move cannot prohibit the former from taking the matter before ICSID. Even in this case, the dispute can be submitted to ICSID if the local court has not yet rendered a decision.[111] In Ethiopia-Finland BIT too, Article 9(3) provides that an investor who has submitted the dispute to a national court may nevertheless have recourse to ICSID before a judgment has been delivered on the subject matter by a national court.

The BIT between China and Ethiopia is a bit different. First, all disputes other than the amount of compensation for expropriation has to be submitted to the competent court of the Contracting Party accepting the investment.[112] The class of disputes that would be considered by ICSID is only those disputes involving the amount of compensation for expropriation. Even for those disputes involving the amount of compensation for expropriation, the ICSID shall not apply if the investor concerned has resorted to the domestic courts.[113] Hence, in Ethiopia-China BIT, those classes of dispute other than the amount of compensation for expropriation would not be considered by ICSID.

The BIT between Ethiopia and Tunisia does not at least allow forum shopping by the investor once it choices the competent court or administrative tribunal of contracting states. According to Article 9(3) of Ethiopia and Tunisia BIT, the investor shall be entitled to submit the dispute to ICSID only if the investors concerned has not brought the dispute before the courts of justice or administrative tribunals or agencies of competent jurisdiction of the Contracting Party that is a party to the dispute.[114] In summary, the provisions of the Ethiopia BIT would make it far easier for companies to sue governments before ICSID

[110] Id., Article 26.
[111] Article 11(3) of Ethiopia- Germany BIT.
[112] Article 9(2) of Ethiopia-China BIT.
[113] Id., Article 9/3/.
[114] Article 9(3) of Ethiopia - Tunisia BIT.

without exhaustion of local remedies and it provides no possibility of reconsideration of the award. Consequently, all the worries of developing states discussed before are a concern for Ethiopia as well.

Conclusion

The ICSID Convention has undeniable benefits to both investors and host states. For the investor, it provides direct access to an effective international forum should a dispute arise. For those states, more specifically developing states, it improves its investment climate. However, developing states have concerns that lead some of them to withdraw, stay out of the convention, or to take defensive steps of quitting membership. Firstly, developing countries have become concerned about the complex nature, duration, and cost of arbitration. Secondly, developing countries are in dilemma with ICSID's lack of transparency given some investment dispute involves public interests. Yet another concern about investment arbitration is the exclusion of local remedies and the absence of appeal system. Although the ICSID award with procedural inefficiencies can be annulled, there is no recourse for substantively flawed rulings. Hence, an appellate system should be introduced to permit the correction of legal errors that might otherwise inappropriately affect developing nations. Finally, most of Ethiopia's BIT contains provisions submitting jurisdiction of ICSID with inconsistent expressions. While some of the BIT provides explicit consent to ICSID jurisdiction, others only provide an agreement to consent. Besides, all Ethiopia's BITs would make it far easier for companies to sue the government before ICSID without exhaustion of local remedies and with no possibility of reconsideration of the award. Introducing a model bilateral investment treaty would help Ethiopia in negotiating new or revisiting the existing BITs with clear investor-state dispute settlement clauses that should make consent to ICSID jurisdiction limited to classes of the disputes with exhaustion of local remedies.