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Assessing the Pros and Cons of Ratification of ICSID Convention for Ethiopia

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Declaration

I, Hiwot Bezabih Beyene, hereby declare that this thesis is my original work and has not been submitted for a degree in any other academic and research institution. And all sources used in this thesis have been duly acknowledged and cited.

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Acronyms

BITS	Bilateral Investment Treaties
BITs	Bilateral Investment Treaties
FCNs	Friendship, Commerce and Navigation
FCNs	Treaties of Friendship, Commerce, and Navigation
FDI	Foreign direct investment
GATT	General Agreement on Tariffs and Trade
ICC	International Court of Arbitration of International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
ICSID/AF	International Centre for Settlement of Investment Disputes/Additional Facility rules
IIA	International Investment Agreement
ISDS	Investor-State Dispute Settlement
LCIA	London Court of International Arbitration
SCC	Stockholm Chamber of Commerce
TIPs	Trade and Investment Partnership
UAE	United Arab Emirates
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development

Abstract

ICSID was formed as a center for the resolution of investment disputes by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. On October 14, 1966, the Convention came into effect after being approved by 20 countries. 143 states had ratified the Convention as of April 10, 2006, making them the Contracting States. Although Ethiopia has signed the ICSID convention, it has not yet been ratified. However, because several of Ethiopia's BITs accepted submission to the jurisdiction of ICSID and its additional facilities, ICSID mechanisms will affect Ethiopia. As a result, it is necessary to examine the cost and benefit of ratification of the ICSID convention for Ethiopia. As a result, it is necessary to look into the effects of recourse to the ICSID jurisdiction without ratifying the ICSID Convention. To assess the possible consequences of Ethiopia's ratification of the ICSID Convention, relevant bits of the country that acknowledge the Center's jurisdiction are examined. To achieve most of the potential advantages and reduce any potential drawbacks the Convention may encounter if investment disputes based on the BITS arise in the future, the study critically evaluates the prospects and difficulties of Ethiopia's ratification of the ICSID convention.

Key Words: ICSID, Ratification, Challenges and Prospects, Ethiopia, BIT.

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CHAPTER ONE

1.1. Background of the study

A private corporation or entity invests in a business enterprise in another country, usually a developing one, through a process named foreign direct investment (FDI).[1] FDI may be advantageous to both parties. While the investor benefits from the widened market and production networks, FDI also has a significant impact on the developing country's economic development by promoting it.[2] Foreign direct investment has indeed made a significant contribution to the generation of jobs, boosting recipient nations' wealth and economies, improving the quality of life, facilitating the exchange of goods, enabling greater and better access to the recipient's infrastructure, and facilitating the exchange of innovations, all of which have helped their economies grow over time.[3] It is also true that by enabling emerging economies to cater to global investors and markets, which in turn assist a state's economy and its inhabitants flourish, an open international investment environment makes them more competitive. In today's globalized and interconnected value chains, foreign direct investment and foreign trade are even more important components of the overall investment and trade picture.[4]

Most developing countries actively seek FDI to attract capital from abroad, which will help their home economies grows.[5] Despite having an abundance of human and natural resources, developing nations require more FDI because they lack the resources and technology to support economic activities that can successfully expand their domestic economies.[6] Most countries have signed one or more investment agreements that, in different ways, liberalize, encourage, safeguard, or

[1] Christoph Schreuer, Course on Dispute Settlement: International Centre for Settlement of Investment Disputes United Nations Conference on Trade and Development, New York and Geneva, (2003), <https://unctad.org/system/files/official-document/edmmisc232_en.pdf> accessed 6 January 2022

[2] Ibid.

[3] Endryas Tekalegn,' Evaluating Investor-State Dispute System under Ethiopia's Bilateral Investment Treaties: Looking a Workable Roadmap' (2019) 10 Beijing Law Review P.115.

[4] Ibid, P.2.

[5] Felix O. Okpe, 'Endangered Element of ICSID Arbitral Practice: Investment Treaty Arbitration, Foreign Direct Investment, and the Promise of Economic Development in Host States '(2014) 13:2 Richmond Journal of Global Law & Business P. 223.

[6] Ibid.

regulate foreign investment flows to support their economic development plans. These agreements often apply to investment in the territory of one country by investors of another country.[7]

Expropriation, limitations on the transfer of income and capital obtained in the receiving country, rejection or inability to renew licenses of the investment, unjustifiable and exclusionary practices and regulatory policies by the host state, or intervention by national courts that are oftenly biased against foreign investors are just a few examples of actions that could harm foreign investors, are just a few of the economic and political risks that foreign direct investment decisions frequently involve., therefore, before investing a substantial amount of money and making any expenditures in the host country, assurances and guarantees that they would be treated fairly and equally with other investors in the host state are necessary.[8] Foreign investors are also exposed to the host country's peculiar and lesser-known environment, which includes its distinct ideology, culture, legal system, and political infrastructures, as well as a particular sensitivity to host state interference. [9] Certain methods have been adopted over time to lessen the vulnerability of the foreign investor to the difficulties that may be experienced in an unknown and unfamiliar system. These mechanisms include the investor's home state's diplomatic protection, the host state's obligation to respect foreign investment under customary international law, adherence to legal restrictions on expropriation procedures and compensation, arbitration of investment disputes as provided by multilateral and bilateral investment treaties, national investment laws, and the parties' investment agreement, as well as enforcement procedures before state courts. [10] Foreign investors are also given protection under investment agreements they enter into with entities within the host state.[11]

[7] Peyman Ghaffari, 'Jurisdiction & Admissibility in International Investment Arbitration' (Thesis, Anglia Ruskin University 2012) P.4

[8] Tekalegn, (n 3), p.116.

[9] Martha Belete Hailu and Tilahun Esmael Kassahun, 'Rethinking Ethiopia's Bilateral Investment Treaties in light of Recent Developments in International Investment Arbitration' (2014) 8 Mizan Law Review P. 119.

[10] Ibid.

[11] Ibid.

However, it is not advantageous from the investor's point of view to settle investment disputes in the host state's court. [12] Investors claim that the host state courts are not impartial since not enough protections are provided for foreign investors. For instance, domestic law is binding on domestic courts. Therefore, even if the investor's rights would otherwise be protected by international law, the host state's domestic law will be used. Additionally, investors contend that the regular domestic courts lack the technical expertise necessary for the fair settlement of complicated international investment disputes.[13] Foreign investors also feel that the protection provided by customary international law is insufficient. Not only were there no generally accepted rules on the matter in customary international law, but there was also no binding system in place to settle investment disputes.[14]

Another method used for resolving investment disputes is diplomatic protection. The diplomatic protection of investors, however, is a lengthy, onerous, and largely ineffective process. There are still several obstacles to compensation even when a state is willing to espouse an investor's claim. [15] There are many drawbacks to diplomatic espousal, and it can lead to political tensions between countries. Therefore, investor-state arbitration should depoliticize investment conflicts.[16] Global investment agreements, including bilateral and even multilateral agreements, were developed to deal with these uncertainties by reaffirming basic standards of treatment and attempting to create safety nets that reduce the risks to investors by fostering the resolution of investment disputes via well-established, unbiased, and non-political international arbitration procedures.[17]

Investment treaties were negotiated because investors and their home states wanted a way to shield their foreign assets from the injurious actions of host country governments.[18] Investment

[12]Elizabeth Maul,' The International Centre for the Settlement of Investment Disputes and the Developing World: Creating a Mutual Confidence in the International Investment Regime' (2015) 55 Santa Clara Law Review P.887.

[13] Ibid.

[14] Belete and Esmael, (n 9), P. 119.

[15] Diana Marie Wick, 'The Counter-Productivity of ICSID Denunciation and Proposals for Change' (2012) 11. Journal of International Business & Law P. 250.

[16] Ibid, P. 251.

[17] Tekalegn, (n 3), P.116.

[18] Marie, (n 15), P.252.

treaties, such as BITs, are the "building bricks" of the international investment regime and the body of current investment treaties creates a regime. [19] BITs were derived from Treaties of Friendship, Commerce, and Navigation (FCNs), however, one drawback of FCNs was the absence of dispute resolution clauses. [20] To give private investments more protection under international law, modern international investment agreements started to emerge in the 1960s.[21] BIT development, however, was intermittent until the 1980s. Since that time, there has been a significant increase in the number of BITs, which presently number in the thousands.[22] The protection of investor rights in foreign countries was the sole emphasis of investment treaties throughout their formative years.[23]

Only to the degree that they are upheld by the Bits' dispute resolution provisions are the substantive rights and protections under BITs effective.[24] One of the most crucial purposes of BITs is to provide a system for effective and efficient dispute resolution. As can be seen, investment treaties have also developed their methods for resolving disputes. The state is assumed to have given its consent under the treaty provision when they allow the foreign investor to typically invoke remedies through arbitration. Thus, it may be said that an effort has been made to create an investment protection regime.[25]

On the hypothesis that FDI contributes to economic development, it is fair to ask whether the investment treaty arbitration mechanism attracts FDI.[26] The influence of the dispute settlement mechanism in attracting FDI is a contested issue. Some commentators believe that dispute settlement mechanisms, such as arbitration, attract FDI, but others insist that isolating investment

[19] Ibid.

[20] Ibid, P.252.

[21] Howard Mann,' Reconceptualizing International Investment Law: Its Role in Sustainable Development', 17 Lewis & Clark L. Rev. (2013) P. 523.

[22] Marie, (n 3), P.252.

[23] Mann, (n 21) P.524.

[24] Kenneth J. Vandevelde, *Bilateral Investment Treaties: History, Policy, & Interpretation* (oxford University Press 2010) P. 434- 435.

[25] M. Sornarajah, *The International Law on Foreign Investment* (3rd edn, Cambridge University Press 2010) P.276.

[26] Susan D. Franck,' Foreign Direct Investment, Investment Treaty Arbitration and the Rule of Law' Global Bus. & Devel. L.J. (2007) P. 338.

arbitration from other substantive treaty rights may be impracticable.[27] It has been suggested that the substantive or procedural right to investment treaty arbitration is one of the strongest incentives for the protection of foreign investment in the host State.[28] Without firm guarantees for foreign investment protection, it is unlikely that a foreign investor will undertake FDI in the host country. This has been done, for example, by allowing foreign investors to enforce their substantive and procedural rights against the host State through investment treaty arbitration. [29] However, other factors could encourage FDI in addition to the protection of foreign investment Potential foreign investors may also take economic and political issues into account, such as market size, production costs, and the host country's political stability.[30] However, from the standpoint of the foreign investor, the protection of foreign investment seems to be one of the most important factors in the protection of FDI. The consideration of the other aspects may therefore no longer be necessary if there is no protection mechanism.[31]

The World Bank also noted that the proposed dispute resolution system is intended to improve the investment climate and would so tend to boost the flow of private capital before starting the journey that eventually gave rise to the ICSID Convention.[32] In light of this, the World Bank started researching a global arrangement to facilitate the settlement of investment disputes between State parties and foreign investors, which ultimately resulted in the ICSID Convention.[33]

The International Centre for Settlement of Investment Disputes was founded by the ICSID Convention. The Convention was drafted by the Executive Directors of the World Bank.[34] On March 18, 1965, the Executive Directors submitted the Convention and accompanying Report to the World Bank member nations, calling them to take the Convention under consideration

[27] Okpe, (n 5) P.245.

[28] Franck, (n 26) P.341.

[29] Ibid, P. 341-345.

[30] Ibid, P. 349.

[31] Ibid.

[32] Okpe, (n 5) P.245

[33] Ibid.

[34] ICSID Convention Rules and Regulation, < https://icsid.worldbank.org›Documents resources> accessed 10 January 2022.

for signing and ratification.[35] On October 14, 1966, the Convention entered into force after being approved by 20 nations. 143 nations had ratified the Convention as of April 10, 2006, making them the Contracting States.[36]

Ethiopia is one of the signatory states to the ICSID convention, but it has not yet ratified the convention.[37] However, ICSID mechanisms will have an impact on Ethiopia since many of its BITs recognized submission to the jurisdiction of ICSID and its additional facilities. Thus, this research will examine the pros and cons of ratification of the ICSID convention for Ethiopia.

1.2. Statement of the Problems

Ethiopia is Africa's eighth-largest receiver of foreign direct investment in 2020 due to the government's pro-investment stance and East Africa's top receiver of foreign direct investment.[38] This shows that Ethiopia is becoming a hub of foreign direct investment and in the process of this growing investment in the country, a dispute is inevitable.

Over the past two decades, more than thirty BITs have been signed between Ethiopia and foreign States.[39] In many of the BITS in these Bilateral International Treaties, the ICSID Convention is indicated as a dispute resolution mechanism. Ethiopia is a signatory state to various bilateral agreements, most of which refer to ICSID, but the country is still not a member of the ICSID convention.[40] And the issue is that how the country could coup up with ICSID without being aware of the ICSID scheme. Ethiopia as a signatory to the ICSID convention and having several Bilateral Investment Treaties that refer to ICSID, it is obvious that an Investor-State dispute may arise and a country will become a defendant or a claimant in the future.

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[35] Ibid.

[36] World Bank, Database of ICSID Member, < https://icsid.worldbank.org/about/memberstates/database-of-member-states/ > accessed 10 January 2022.

[37] Ibid.

[38] <https://africa.businessinsider.com/local/markets/here-are-the-top-10-african-countries-with-highest-fdi/7264vlzacssessed> accessed 1 January 2022.

[39] <http://investmentpolicyhub.unctad.org/IIA/CountryBits/67#iiaInnerMen> accessed 01 February 2022.

[40] World Bank, Database of ICSID Member, < https://icsid.worldbank.org/about/memberstates/database-of-member-states/ > accessed 10 January 2022

Should Ethiopia join ICSID as a result? What difficulties might it encounter if it joins? What does the country stand to lose if it opts out of the agreement while approving the center's jurisdiction via its BITS? Given that some states have denounced ICSID, others submit investment disputes to domestic courts, and still others only use the ICSID for a select few claims as opposed to all claims, this research aims to evaluate the costs and benefits of being a party to ICSID in order to determine what Ethiopia's position should be.

1.3. Research Questions

Based on the above statements of the problem, the researcher has attempted to address the following research questions:

1. What is the relevance of acceding to ICSID for Ethiopia?
2. What are the possible disadvantages of Ratification of the convention for Ethiopia?
3. What will be the potential consequences if Ethiopia ratifies the convention?
4. What are the limitations of ICSID in the settlement of investment disputes?
5. How can Ethiopia benefit from the ratification of the convention and shape the jurisprudence of ICSID?

1.4. Objective of the study

1.4.1. General objective

The paper main objective is to look into the limitations to and opportunities created up on Ethiopia's ratification of the ICSID convention.

1.4.2. Specific objective

To achieve the general objective different specific objectives will be addressed. These Specific objectives among others are:

- Examine the cost & benefit of being a party to the ICSID system.
- Identify and examine the consequences of referring to the ICSID jurisdiction, without ratifying the ICSID Convention.
- Identify gaps in the investor-state dispute settlement provision of the country under BITs to which Ethiopia is a party.
- Offer recommendations on how Ethiopia may interact with the ICSID community and its system.

1.5. Scope of the study

This study is limited to assessing the Challenges and Prospects of ratification of the ICSID convention for Ethiopia and examining the consequences of referring to the ICSID jurisdiction, without ratifying the ICSID Convention.

1.6. Significance of the study

The study has the following importance for the treaty negotiators, state parties to the treaty academicians, and researchers.

- The study plays an informative role for the negotiators to assess the impact of using ICSID as a dispute resolution method under BITs to which Ethiopia is a party.
- It will also be used as input by treaty makers while negotiating the treaty to critically examine what will be the impact of ratification of the Convention on the ISDS.
- Moreover, the research will serve as the foundation and can draw the interest of individuals who want to carry out additional research in the area., it may also serve as reference material in the academic sphere.
- Finally, the study findings and recommendations will contribute to strengthening the existing and developing new policy measures for Ethiopia to avoid potential challenges of ICSID in Investor-State disputes that may arise in the future.

1.7. Limitations of the Study

Different challenges are expected, mainly, since the study fully depends on qualitative data already available and does not include quantitative data collected empirically, scarcity of literature and reports of the subject matter about the study in question plays greater limitations on the outcome of the study. The other constraint of the researcher is related to time and finance.

1.8. Literature Reviews

Due to the proliferation of bilateral investment treaties, and a dramatic rise in litigation under such treaties Several authors have written on the challenges and opportunities of ICSID, but only a few wrote about the pros and cons of Ratification of the convention for Ethiopia.

Among those few studies, there was an article written by Haile Andargie (2019)[41], that focused on ICSID arbitration in the context of developing countries. Besides, the author analyzed relevant BITs of Ethiopia that recognize the jurisdiction of the Center to explore the potential consequences if it ratifies the ICSID. However, the researcher did not go to explore the cost and benefit of the ratification of the convention for Ethiopia specifically and did not look for a proposal for ratification or non-ratification of the convention. Which is the main focus of this study. The focus of the author is only on the consequences of BITS that refer to ICSID jurisdiction in the event Ethiopia ratifies the Convention.

The other related topic is an article written by Endryas Tekalegn.[42] The article examined the BITs signed by Ethiopia and evaluates the ISDS and arbitral organizations to which Ethiopia has agreed to use to settle investment disputes (mainly ICSID) that can emerge among it as a host state and investors of another state, and recommend an arbitral entity other than ICSID. Therefore, the author of the article focused on the partiality of ICSID for developed states and looked for exclusion of the convention in one way or another from those treaties to which Ethiopia will be a party or took effective steps to terminate the existing bilateral investment treaties, due to ICSID's widespread criticism, including claims that it favors wealthy Western countries (the North) and their investors. However, the author did not try to assess the prospects of the ICSID convention for investment dispute settlement for developing nations before reaching such a conclusion. The above-mentioned gaps left by different writers in the area are what trigger the researcher to research to fill a gap.

1.10. Research Methodology

The research employed a doctrinal legal research method. It examined the potential challenges and prospects of ratification ICSID convention for Ethiopia by analyzing and interpreting laws relevant to the topic. Using the method, the thesis scrutinizes the ICSID Convention, various reports, scholarly research findings, and other kinds of literature in the field.

[41] Haile Andargie,ّAnalysis of ICSID Arbitration from the Perceptive of Developing Countries: A Bittersweet Choice' (2019) 10 Bahir Dar University Journal of Law.

[42] Endryas Tekalegn,' Evaluating Investor-State Dispute System under Ethiopia's Bilateral Investment Treaties: Looking a Workable Roadmap' (2019) 10 Beijing Law Review.

This research is principally based on an assessment of existing literature and legal and non-legal instruments about the investor-state dispute settlement under ICSID. Information will be gathered from various primary and secondary sources. Primary sources are the ICSID convention and its additional facility rules. Secondary sources include books, journals, articles, internet sources, reports, and BITS signed by Ethiopia.

1.10. Organization of the Study

This work consists of five chapters each of which is further divided into sections and subsections. Chapter one is the introductory part of the thesis. It includes background to the problem, statement of the problem, research questions, the objective of the study, research methodologies, significance, and limitations of the study. Chapter two will briefly discuss the ICSID Convention. This chapter discusses the origin and historical background of the convention, objectives, Jurisdiction, and applicable rules of the ICSID convention. The third chapter analyzes the bilateral investment treaties that Ethiopia signed or ratified which refer to the ICSID as a means of dispute settlement mechanism. Chapter four examines the cost and benefit of ratification of the ICSID convention for Ethiopia. This section aims to analyze the potential consequences that Ethiopia may encounter if it ratifies the ICSID Convention. The chapter will also analyze the major criticisms forwarded against ICSID by developing countries. Chapter five forwards the conclusion and recommendations arising from the findings of the research.

Chapter Two

General Overview of ICSID Center

2.1 The Origin and Historical Background of ICSID

The protection of foreign investment became a problematic issue in international efforts aimed at promoting foreign investment for economic development. [43]The economic development of the host State and the home State of the foreign investor could have been gravely affected if something was not done to address the legitimate concerns of foreign investors. Foreign investors from developed countries desire bigger foreign markets for their investment to maximize FDI and repatriate profits that contribute to economic development in their home States.[44] In contrast, developing countries want to attract foreign investment through private international investment for economic development.[45] Therefore, there arose a potential peril to the variables of foreign investment and economic development because there was no effective mechanism to protect foreign investment nor overcome its limitations vis-a-vis the settlements or adjudication of foreign investment claims between foreign investors and host[46] , In other words, the absence of a generally accepted system for the resolution of foreign investment disputes became the weakest link in the international quest for the promotion and protection of foreign investment.[47] The problem became an issue for the World Bank, the organization which is charged with international development.

The World Bank, founded in 1944, assisted European postwar reconstruction and development at the end of World War II. With its success in Europe, the bank's responsibilities metamorphosed into pursuing programs for the global reduction of poverty and development in third-world countries.[48] In the 1960s, the World Bank became concerned with the problem of settling disputes between foreign investors and hosts as an issue affecting the protection of foreign investment.[49]

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[43] Felix O. Okpe, 'Endangered Element of ICSID Arbitral Practice: Investment Treaty Arbitration, Foreign Direct Investment, and the Promise of Economic Development in Host States '(2014) 13 Richmond Journal of Global Law & Business P.230

[44] Ibid

[45] Padma Mallampally & Karl P. Sauvant, 'Foreign Direct Investment in Developing Countries' (1999) 36 FIN. & DEV<https://www.imf.org/external/pubs/ft/fandd/1999/03/mallampa.htm.>accessed 1 April 2022

[46] Felix O. Okpe, (n 43), P.230

[47] Ibid, P.232

[48] World Bank History, <https://www.worldbank.org/en/about/history> accessed 3 April 2022

[49] Ibid

On several occasions, foreign investors and host governments approached the World Bank to mediate the settlement of their investment disputes.[50] These overtures to the Bank to intervene were made against the background of the limited and unacceptable options open to foreign investors and governments under customary international law.[51]

In a note to the Executive Directors of the World Bank on "Settlement of Disputes between Government and Private Parties," the General Counsel of the World Bank suggested the establishment of international arbitration as a way out of the imbroglio. The General Counsel then advocated the formation of an international structure for the conduct of investment dispute arbitration, including the establishment of a permanent tribunal and the provision of conciliation services as an alternative to arbitration.[52] States should acknowledge the prospect of direct access by foreign investors to an international platform for the settlement of disputes, and commitments to submit such matters to international agreements are binding international duties, according to the General Counsel. [53]The proposal and the suggestions of the General Counsel to the Executive Directors of the World Bank thus laid the foundation for the process to create the ICSID Convention.

The ICSID Convention is the result of three rounds of hard negotiations: internal World Bank drafting, regional meetings of legal experts from participating countries, and a convocation of member-state delegates.[54] The most crucial factor in the Center's founding was the need to look for innovations that could help promote international economic development. The World Bank commissioned a working group led by Aron Broches, the Bank's General Counsel, to begin negotiations in June 1962. The working committee was tasked by the World Bank with preparing a draft Convention for internal assessment.[55] The first draft Convention which is produced by the World Bank working group, extended jurisdiction to any dispute between the parties with a minimum amount in dispute of $100,000, with no reference to any subject matter restrictions. Others

[50] History of The ICSID Convention: 'Documents Concerning the Origin and Formulation of The Convention on The Settlement of Investment Disputes Between States and Nationals of Other States' (1968) 3 Vol. II, Part 1, ICSID Publication <https://icsid.worldbank.org/sites/default/files/publications/History%20of%20the%20ICSID%20Convention/History%20of%20ICSID%20Convention%20-%20VOLUME%20II-1.pdf> accessed 4 April 2022

[51] Ibid

[52] Felix O. Okpe, (n 43), P.232

[53] Ibid

[54] Ibid, P.233

[55] Ibid

raised concerns about the need to separate political or commercial disputes from disagreements over legal and contractual rights after reviewing the draft and those initial draft questions provided the groundwork for the ICSID's exclusion of political and commercial issues from its jurisdiction. [56] The Center's jurisdiction was confined in the second internal draft, submitted in October 1963, to "any current or future investment issue with a legal character."[57]

The Council of Legal Experts; between December 1963 and May 1964, consultative meetings of legal experts from the negotiation parties were held in Addis Ababa, Santiago, Geneva, and Bangkok. The thorny issue of what constitutes "investment" produced a divide between capital-importing and capital-exporting countries throughout this period. Capital-importing countries desired a specific definition of investment, but capital-exporting countries sought an open approach to the kind of issues that the Center could resolve.[58]

To resolve the opposing contentions represented above, the World Bank proposed a definition of "investment" for the first time. The Bank defined" investment " as any contribution of money or another item of financial value for just an indefinite time or, if the period is determined, for a minimum of five years. The developed nations contended that the proposed definition was too restrictive, in that it could create impediments to investment agreements. In contrast, developing countries articulated a narrower definition of "investment''.[59] The working group stated that there was a deadlock on how to define investment among the competing blocs and within the group itself, It seems the World Bank advocated a broad definition of "investment To protect international interests.[60] This is because there was agreement on the importance of spreading development to emerging economies, but not on the subject of foreign investment protection. It is arguable whether a wider definition of "investment" would better serve the interests of foreign investors, though this could explain why the earlier draft given to the Committee of Legal Experts did not include a recommended definition of "investment."[61]

[56] Felix O. Okpe, (n 43), P.233
[57] Ibid
[58] Ibid, P.235
[59] Ibid
[60] Ibid
[61] Ibid.

The convocation of delegates constituted the "Legal Committee" that prepared the final draft of the Convention for approval by the World Bank Executive Directors.[62]

The Convention on the Settlement of Investment Disputes between States and Nationals of Other States established the International Centre for Settlement of Investment Disputes.[63] The Executive Directors of the World Bank developed the Convention. [64]The Executive Directors presented the Convention and accompanying Report to member nations on March 18, 1965, for their evaluation with a view to their signature and ratification. On October 14, 1966, the Convention became operative.[65]

Following 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. [66] In other words, the Center facilitates the resolution of investment disputes and does not by itself directly adjudicate investment disputes between contending parties.[67]

The framework of ICSID conciliation and arbitration proceedings is governed by the ICSID Convention, the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the Institution Rules), the Administrative and Financial Regulations, the Rules of Procedure for Conciliation Proceedings (the Conciliation Rules) and the Arbitration Rules, as amended with effect from January 1, 2003 and adopted by the ICSID Administrative Council in accordance with Article 6(1)(c) of the convention.[68]

2. 2. Objective of ICSID

ICSID's founding documents reveal three broad purposes that the institution sought to achieve. They reflect the tenets of an institution that subscribes to a neoliberal economic paradigm, as ICSID sought to enshrine the legal/political and the public/private divide by excluding the state

[62] World Bank, Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and National of other States, (hereinafter Report of Executive Directors)
[63] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) (hereinafter 'ICSID Convention')
[64] Ibid
[65] Ibid
[66] Ibid, art 1 of ICSID Convention
[67] Felix O. Okpe, (n 43), P.237
[68] Mary Anyango Oganga, 'The International Centre for the Settlement of Investment Dispute: Jurisdiction and Relevance to Africa' (Thesis, University of Nairobi, 2007) P.1

from the sphere of foreign investment, which is considered by some as a private sphere.[69] Foreign investors are the target of the first of ICSID's three promises. Through the provision of mechanisms for resolving investment disputes between contracting nations and foreign investors, ICSID was established to safeguard international investment in the Third World. The need for such an institution arose from the gap left by the direct colonial hold on many Third World nations eroding in the middle of the 20th century.[70] Second, promoting investment flows to Third World countries is one of the main arguments in support of the creation of ICSID, which is known as the "primary goal" of the ICSID Convention.[71] When it "became increasingly evident that if the plans formed for the expansion in the developing country economies were to be achieved, it would be necessary to augment the resources flowing to these states from multilateral and bilateral governmental sources by additional in-vestments emanating in the private sector," ICSID was founded during the first advancement decade, which spanned the 1960s.[72] However, despite claims to the contrary, the ICSID Convention only substantively addresses the former. This is irrespective of the fact that ICSID was allegedly founded to resolve investment disputes and promote the circulation of private capital to the Poorest Countries. The ICSID Report predominantly makes mention of the latter rationale, which has mostly gained popularity through anecdotal recurrence.[73]

The third promise of ICSID is to foster confidence between host states and foreign investors, which incorporates the first two goals. The establishment of an organization that facilitates the resolution of conflicts between host states and foreign investors can be a significant step towards the promotion of a climate of confidence and, consequently, the generation of a greater flow of international private capital in the countries which seek it.[74]

According to the ICSID Report, the Convention is founded on the idea that ensuring investment protection by offering a method for resolving disputes encourages the transfer of private capital to host governments. As such, ICSID was established to be more than an investment dispute As a

[69] Ibironke T. Odumosu, 'The Antinomies of the continued relevance of ICSID to the third world' (2007) 8 San Diego international law Journal P.357.
[70] Ibid, P.358
[71] Ibid
[72] Ibid
[73] Ibid, P.359
[74] Report of Executive Directors, (n 62), Para 9

result, ICSID was created as more than just a venue for the resolution of investment disputes; it also served to encourage the flow of capital for the purpose of promoting economic growth. [75]

2.3 Applicable rules of ICSID

The inquiry into the law 'applicable' to a dispute seems, on its face, a fairly simple question: identifying the law that will govern the resolution of the dispute. [76]Because of the essential premise of party autonomy in international arbitration, the arbitrators' examination is primarily focused on determining whether the parties have chosen the law that will govern their dispute. The arbitrators must decide the law that will apply to the dispute only if there is no such choice. As a result, the analysis framework is obvious.[77] The arbitrators' subsequent examination into the content of the law that will apply and how much content must be demonstrated must first be distinguished from the choice of law process. It is also separate from the evaluation of how the arbitrators applied or failed to apply such legislation to the merits of the dispute at the end of the arbitral process.[78]

The law applicable in ICSID arbitration comprises substantive law and procedural rules. It is widely known that substantive law must be distinguished from procedural rules where both regimes are applicable in the resolution of disputes between parties. substantive law determines the rights and obligations while procedural rules provide the framework for the enforcement of the rights and obligations defined by substantive law.[79] The State party and the foreign investor choose the law applicable to ICSID arbitration based on the doctrine of party autonomy, but ICSID arbitration procedural law or rules are dictated by the relevant provisions of the ICSID Convention. In other words, while the parties to international arbitration within the framework of the ICSID Convention may agree on the applicable procedural law, such agreement cannot be contrary to the procedural provisions of the ICSID Convention.[80]

Under the Convention, parties will have full autonomy to decide which rules of law the arbitrators should apply to the substance of the dispute. Article 42(1) of the Convention provides in its

[75] Ibid, para 12
[76] Yas Banifatemi,'The Law Applicable in Investment Treaty Arbitration' Katia Yannaca-Small(ed) *Arbitration Under International Investment Agreements; A Guide to The Key Issues* (Oxford University Press 2010) P.191
[77] Ibid
[78] Ibid.
[79] Felix O. Okpe, (n 43), P.239
[80] Ibid, P.240

first A tribunal "must adjudicate a dispute applying such principles of law as may be agreed among the parties," according to Article 42(1) of the Convention." In the absence of such agreement of the parties, the second sentence of Article 42(1) states that a tribunal must "apply the law of the Contracting State party to the dispute (including its rules on conflict of laws) and such norms of international law as may be applicable." Article 42(3) of the Convention makes it clear that a tribunal may, if the parties so agree, also decide a dispute ex aequo et Bono, that is, following considerations of equity and justice as opposed to strict rules of law. [81]Article 54(1) of the ICSID Additional Facility Rules confirms the salient provisions of Article 42(1) of the ICSID Convention.[82]

2.4 Jurisdiction of ICSID Center

Jurisdiction is determined in the ICSID system by the Secretary-General, even though only in a limited manner. This is performed upon the submission to him for the arbitration request, if the request is registered by the Secretary-General of the center and a tribunal is constituted, the tribunal may consider jurisdiction at any time[83]. If the Secretary-General finds that the dispute is not within the purview of the ICSD Centre, it shall not accept a request for arbitration pursuant to Article 36(3) of the ICSID Convention.[84]

Arbitration rule 41 provides that Objections can be made to jurisdiction and such objections must be made as early as possible. Often, objections must be sent to the Secretary-General by the time the time limit for submitting the counter-memorial has passed.[85] Last but not least, an ICSID tribunal may decide at any point throughout the proceedings if a dispute or ancillary issue is within the Centre's purview and its competence.[86]

According to Article 25 of the convention, the jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State and a national of another According to Article 25 of the convention, the Center has jurisdiction over any legal issue

[81] ICSID Convention, (n 63), Art 42
[82] Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes, revised 1 Jan. 2003 (original rules 1978), (hereinafter 'ICSID Additional Facility Rules') Art 54(1)
[83] ICSID Convention, (n 63), Art 36
[84] Ibid, Art 36(3)
[85] Ibid, Art 41
[86] Ibid, Art 41(1)

among a Contracting State and a national of another Contracting State that results directly from an investment and that the parties to the dispute agree to bring to the Center in writing. No party may unilaterally withdraw its approval after the parties have given it.[87]

The basic requirements for ICSID jurisdiction are outlined in Article 25 of the Convention. To find jurisdiction, an ICSID tribunal must determine (1) a legal dispute that results directly from an investment, (2), among a citizen of one Contracting State and another Contracting State, and (3) that the parties have agreed to submit in writing to ICSID for the purpose of resolving disputes. Therefore, three requirements have to be satisfied for ICSID to have jurisdiction. These are; consent of the parties, personal jurisdiction, and subject matter (material) jurisdiction.

2.4.1 subject matter jurisdiction

According to Article 25(1) of the convention, the Center's authority is limited to legal disputes that directly result from investments. The main requirements for the subject matter jurisdiction of the Centre can therefore be explained as the existence of a dispute of a legal nature and the existence of an investment.

2.4.1.1 Existence of a Dispute of a Legal Nature

The presence of a "legal dispute" in between parties, which is defined as a disagreement regarding "the existence or scope of a legal right or duty, or the essence or extent of the redress to be made for breach of a legal duty," is the first prerequisite for the Center's jurisdiction.[88] The dispute needs to raise ‘legal issues concerning a concrete situation’ rather than general grievances, and the determination of these issues by the tribunal must have ‘some practical and concrete consequences’.[89]Tribunals have, however, interpreted the requirement in a fairly broad manner, holding in particular that ‘the allegation of a breach is not a constitutive element of the notion of a legal dispute’.[90]

[87] Ibid, Art 25(1)
[88] Hanno Wehland, ’Jurisdiction and Admissibility in Proceedings under the ICSID Convention and the ICSID Additional Facility Rules’ Crina Baltag (ed) *ICSID Convention after 50 years: Unsettled Issues (*Kluwer Law International 2017) P.235-236
[89] Ibid, P.236
[90] Ibid

2.4.1.2 Existence of an Investment

The other main requirement concerning the subject matter jurisdiction of the Centre is the existence of an investment but the Convention does not contain the definition of the term "investment". The term investment is not defined in the Convention, to accommodate new and emerging forms of investment. [91] No attempt was taken to define the term "investment" given the crucial necessity of consent by the parties and the mechanism by which the Contracting States can make known in advance, if they so desire, the types of disputes that they might or may not consider submitting to the Centre (article 25(4) of the World Bank Executive Directors' Report accompanying the Convention).[92]

However, A. Broches, in his account of negotiations, noted the following: During the negotiations, several definitions of 'investment' were considered and rejected. Given the crucial condition of consent by the contractual parties, it was ultimately decided that a definition may be dispensed with. This demonstrates how the requirement that the dispute must have arisen out of a "investment" may be combined with the requirement of consent to jurisdiction. Presumably, the party's agreement that a dispute is an 'investment dispute' will be given great weight in any determination of the Centre's jurisdiction, although it would not be controlling.[93]

ICSID tribunals frequently assess the existence of certain criteria thought to be inherent to the notion of 'investment' when examining their jurisdiction. These criteria, which are often referred to as the 'Salini test',[94] have been described as follows: a commitment of resources to the host State's economy; a certain duration of this commitment; the assumption of risk and the expectation of profit; and a contribution to the host State's economic development.[95] Some tribunals have dismissed the fourth criterion of a contribution to the host State's economic development as irrelevant. Others have sought to add further criteria to the Salini catalog, in particular, the need

[91] Katia Yannaca -Small, Definition of "Investment"; An Open-ended Approach for a balanced Approach' Katia Yannaca-Small(ed) *Arbitration Under International Investment Agreements; A Guide to The Key Issues* (Oxford University Press 2010) P.248
[92] Ibid
[93] A. Broches, 'The Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction' (1966).5 COLUMBIA J. TRANSNAT'L L. P. 268
[94] *Salini Costruttori v. Morocco*, ICSID Case No. ARB/00/4, (23 July 2001), para. 52
[95] Hanno Wehland, (n 88), P.236

for an investment to have been made in good faith.[96] Recent decisions have often expressed the view that the Salini criteria should be applied with some flexibility and suggested that not all of them necessarily need to be fulfilled for there to be an investment.[97]

2.4.2 Personal Jurisdiction

Regarding personal jurisdiction, Article 25(1) of the ICSID Convention stipulates that the dispute must be between a national of one Contracting State and a Contracting State or any constituent subdivision or agency of a Contracting State designated to the Centre by the State. The term "national of another Contracting State" is defined in Article 25(2) of the ICSID Convention to include both natural and legal persons. Regarding natural persons, Article 25(2)(a) specifically excludes dual nationals with the nationality of the respondent State. In terms of juridical persons, Article 25(2)(b) extends the Centre's jurisdiction to foreign-controlled juridical persons with the nationality of the State that is a party to the dispute, provided that there is a specific agreement in this regard Concerning the Centre's jurisdiction over constituent subdivisions or agencies of a Contracting State, Article 25 ICSID specifies two cumulative requirements. These are the designation of the subdivision or agency by the relevant State and the State's approval of the subdivisions or agency's consent to arbitration according to Article 25(3) of the Convention.

2.4.3. Consent concerning Submission to ICSID

In addition to the subject matter and Personal Jurisdiction requirements discussed above Article 25 of the ICSID convention requires the consent of the parties to submit their dispute to the center.[98] According to Articles 26 and 27(1) of the Convention, the parties' agreement to arbitrate under the Convention is deemed their agreement to arbitrate exclusively, barring express written agreement to the contrary. This clause seeks to establish arbitration as an exclusive remedy, and where a host state and an investor do not retain the right to pursue other remedies, the parties intend to pursue arbitration exclusively.[99]

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[96] Ibid
[97] Ibid
[98] David Wiliams, *Jurisdiction and admissibility in the oxford hand book of international investment law,* (Peter Muchlinski, Federico Ortino and Christophe Scheuer (eds), Oxford University Press 2008) P.871
[99] Lukas Mistlis, *International Investment Arbitration Substantive Principles*, (2nd edn, Oxford University Press 2017) p.302

The ICSID Secretariat may administer arbitration proceedings for the resolution of disputes between States and foreign investors where either the disputing State or the home State of the investor is not an ICSID Convention Contracting State, according to Additional Facility Fully functioning by the ICSID Administrative Council in 1978.[100] The investor-state dispute settlement provisions of BITs concluded by countries that are not Contracting States with countries that are the Contracting States occasionally refer to arbitration under the ICSID Additional Facility Rules.[101]

[100] Antonio R. Para, 'The Initiation of Proceedings and Constitution of Tribunals in Investment Treaty Arbitrations' Katia Yannaca-Small(ed) *Arbitration Under International Investment Agreements; A Guide to The Key Issues* (Oxford University Press 2010) P.106
[101] Ibid

CHAPTER THREE

Analysis of the preconditions of Investment Treaties of Ethiopia in referring to ICSID Jurisdiction

3.1 Introduction

The creation of an International Conciliation and Arbitration Center was supported by Ethiopia. Ethiopia's representative during the drafting of the ICSID Convention. The spokesperson for Ethiopia stated that although "Ethiopian courts were empowered to consider lawsuits against Ministries And departments, the investor always would view them as the vehicle of the State, regardless of how independent the courts may have been. However, given the potentially negative impact such action can have on others, authorities may be reluctant to take action against investors. Therefore, the proposed Center would be useful in fostering better ties between investors and governments" The draft Convention avoided interfering with national laws through proper planning. Prior to now, the issue of investor and host government attitudes had not received the attention it deserved. Thus, Ethiopia welcomed the principles embodied in the draft Convention.[102] Though Ethiopia is not yet ratified the ICSID Convention still only a signatory to it, the country had participated in the drafting of the ICSID convention in 1960 and even hosted a round of negotiations in Addis Ababa.[103]

Ethiopia's representative during the drafting of ICSID suggested that, given the importance of the prestige of the Center of having complete independence, The World Bank president shouldn't be able to choose the center's Secretary-General and Deputy Secretary-General., Financial interests that might also be inconsistent with those positions should be covered by the independence.[104] It would be desirable to not need the Chairman's approval to determine if a specific occupation or employment was appropriate for the position of Secretary-General. A condition like that would grant the Chairman some form of veto authority over the Administrative Council.[105]

The other concern of the country was the cost of the arbitration. Ethiopia suggested that the parties be informed in advance of the fees that would be charged and that the Tribunal's or Commission's independence should not be violated in the process of setting those costs. The delegate recommended that the Tribunal or Commission set the appropriate fees in accordance with a tariff that was periodically created and approved by the Administrative Council.[106] The Chairman retorted that it was essential to avoid paying different fees for the umpire and the arbitrators for the plaintiff and defendant. The variety of disputes and unique situations in different parts of the world, however, could make it difficult for the administrative Council to adopt a fixed tariff. He

[102] History of ICSID, Vol.2, part.1<https://icsid.worldbank.org/sites/default/files/publications/History%20of%20the%20ICSID%20Convention/History%20of%20ICSID%20Convention%20-%20VOLUME%20II-1.pdf ,> accessed 27 March 2022. P.245
[103] UNCTAD Series on Issues in International Investment Agreements II; United Nation, (2011), p.24-27
[104] Ibid, History of ICSID, Vol.2, part.1, <https://icsid.worldbank.org/sites/default/files/publications/History%20of%20the%20ICSID%20Convention/History%20of%20ICSID%20Convention%20-%20VOLUME%20II-1.pdf >accessed 27 March 2022. p.252
[105] Ibid P.253
[106] Ibid P.277

proposed that the Council might provide guidelines as to what appropriate fees would be in some circumstances.[107]

Even Though Ethiopia did not yet ratify the convention, ICSID mechanisms will have an impact on Ethiopia since many of its BITs recognized submission to the jurisdiction of the ICSID center and its additional facilities. Thus, this chapter will examine the essence of the BITs of Ethiopia that refer to ICSID jurisdiction.

3.2 Overview of History of Bilateral Investment treaties

Soon after the country's founding, the United States started to sign "Friendship, Commerce and Navigation" (FCN) treaties, the forerunner to the BIT.[108] Up until after World War II, FCNs were a common component of American policy toward external foreign investment. [109] Contrary to the BIT, and as their names imply, FCN treaties were not exclusively or even predominantly used as vehicles to safeguard assets made overseas. The principal goals of these treaties, however, were the promotion of international trade and the strengthening of international relations. Despite the fact that the treaties provided some protections for American businesses abroad, such as a ban on expropriation without compensation. The importance of FCNs in the control of international trade declined with the rise of the General Agreement on Tariffs and Trade (GATT) following World War II, and the American FCN program was terminated by the middle of the 1960s.[110] Several European nations were engaged in BIT negotiations and agreements with emerging nations when the American FCN initiative had ended fully. These agreements, as opposed to the FCNs, were solely concerned with the protection of investments, a subject not covered by the GATT. The first such agreement was formed in 1959 between Pakistan and West German.[111]

BITs have grown to be a significant component of the foreign investment environment in a short period of time. Over 400 BITs were signed internationally between 1959, the year the first BIT was formed, and 1991.[112] More than a thousand BITs had been signed by the middle of 1996, and nearly every nation was a party to at least one of these agreements.[113] According to the UNCTAD report, there are approximately 3322 agreements, of which 2946 are BITs and 376 are TIPs. Of these treaties, 2638 were in force.[114] By the end of the year 2020, the total number of

[107] Ibid P.277-278

[108] The Paradoxical Behavior of Developing States, <https://jeanmonnetprogram.org/archive/papers/97/97-12-IV.html#fn52> accessed 25 May 2022

109 Ibid.

[110] Ibid

[111] Jeswald W. Salacuse, 'Bit by Bit: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries' (1990) 24 The International Lawyer. P.655

[112] The Paradoxical Behavior of Developing States, <https://jeanmonnetprogram.org/archive/papers/97/97-12-IV.html#fn52> accessed 25 May 2022

[113] Ibid.

[114]UNCTAD (2018). IIA Issues Note, Recent Development in the International Investment Regime. <https://unctad.org/system/files/official-document/diaepcbinf2018d1_en.pdf > accessed 10 April 2022

effective IIA terminations reached at least 393, bringing the IIA universe to 3,360 (from which 2,943 are BITs and 417 TIPs).[115]

According to information provided by UNCTAD, Ethiopia has also signed more than 35 bilateral investment treaties with various nations as a participant in the modern world.[116] Although the country's instability, including in areas with industrial parks, had a negative impact on FDI inflows, in 2019 Ethiopia continued to be the region's top recipient of FDI.[117] In the year 2020 Ethiopia registered a 6 percent reduction in inflows to $2.4 billion which accounted for more than one-third of foreign investment in the subregion. Though the Ethiopian economy suffered from the pandemic, especially in hospitality, aviation, and other services, it still grew a substantial 6.1 percent.[118] With the view to keep the momentum, the country signed investment protection treaties with various countries.

All Ethiopian BITS have Settlement of investment dispute provisions and in those BITs except, BITs with Libya[119], Brazil[120], and Russia[121], there is a clause that allows the disagreement between the investor and the nation (host state) to be resolved at the ICSID center. Thus, the chapter tries to analyze the preconditions of bilateral investment treaties that Ethiopia signed or ratified which refer to the ICSID Jurisdiction as a means of dispute settlement mechanism.

3.3 The conditions of Ethiopian BITs in Referring to the ICSID Jurisdiction

In many BITS of Ethiopia, the ICSID Convention is indicated as a dispute resolution mechanism. Before taking the matter to ICSID countries may limit the power of the ICSID center to a certain class of Dispute and make their consent conditional upon resort to amicable means or exhaustion of local remedies. In this respect, the BITs of Ethiopia exhibit different features.

3.3.1 Ethiopian BITS in limiting the power of the ICSID center to a certain class of Disputes

When the parties have given their consent to the jurisdiction of the ICSID center, no party may withdraw its consent unilaterally.[122] Once the consent is perfected, it becomes irrevocable even if the legislation or treaty is changed or no longer in force and even if the Contracting State enunci-

[115] UNCTAD (2021). IIA Issues Note, Recent Development in the International Investment Regime. <https://unctad.org/system/files/official-document/diaepcbinf2021d6 en.pdf> accessed 12 April 2022
[116] International Investment Agreement Navigator, <https://investmentpolicy.unctad.org/international-investment-agreements >accessed 12 April 2022
[117] UNCTAD World Investment Report 2020: investment and new industry policies (2020) at III <https://unctad.org/system/files/official-document/wir2020_en.pdf >accessed 12 April 2022
[118] Ibid
[119] Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Great Socialist People's Libyan Arab Jamahiriya Concerning the Encouragement and Reciprocal Protection of Investments (signed 27 January 2004, entered into force 25 June 2004) ('Ethiopia–Libya BIT') art 8
[120] Agreement Between the Federative Republic of Brazil and The Federal Democratic Republic of Ethiopia on Investment Cooperation and Facilitation (Signed 11 April 2018) ('Ethiopia-Brazil BIT) art 24
[121] Agreement Between the Government of The Federal Democratic Republic of Ethiopia and the Government of the Russian Federation on the Promotion and Reciprocal Protection of Investments (Signed 10 February 2000) ('Russia -Ethiopia BIT) art 8
[122] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) (hereinafter 'ICSID Convention') ,art 25(1)

ates the Convention.[123] Unless otherwise indicated, the parties' agreement to an ICSID arbitration shall be construed as their consent to that arbitration in lieu of any other available remedy. [124]This means that contracting parties may not be brought judicial or arbitral proceedings in disregard of an ICSID arbitration agreement and seek to obtain an order restraining already instituted ICSID proceedings. By consenting to ICSID Convention, a Contracting State loses the right to give diplomatic protection and make an international claim in a case brought by one of its nationals against another Contracting State.[125]

Consent may be given subject to limitations. The parties may consent to ICSID jurisdiction in general terms, submitting any or all matters relating to the investment or dispute in question.[126] Any Contracting State may notify the Centre of the class or classes of disputes that it would or would not consider subjecting to the jurisdiction of the Centre at the time of ratification, adoption, or approval of the Convention or at any time thereafter. In such a scenario, notification shall not constitute consent, and the Secretary-General shall immediately communicate such communication to all Contracting States.[127]

International arbitration is not substantively restricted by Ethiopia's BITs from hearing particular classes or kinds of investment disputes. This demonstrates that the tribunal will have jurisdiction to hear the case as long as the dispute is arising from the treaty. However, it is stated in the Ethiopia-Brazil BIT that issues pertaining to the environment, labor , health and public security, corporate social responsibility, and corruption are not subject to arbitration..[128] And also in the BIT between Ethiopia and China, all disputes other than the amount of compensation for expropriation has to be submitted to the competent court of the host state.[129]The type of disputes that would be considered by ICSID is only those disputes involving the amount of compensation for expropriation.[130] Hence, in Ethio-China BIT, only disputes concerning the amount of compensation for expropriation would be viewed by the ICSID center. Aside from the two BITs mentioned above There is no substantive restriction imposed on international arbitration under Ethiopia's BITs not to hear particular classes or classifications of investment disputes.

3.3.2 The investor's right to initiate Arbitrations and seek Damages

The majority of the bilateral investment treaties which Ethiopia has signed with countries left the choice to initiate arbitration and seek damages for the investor. In the agreement that Ethiopia

[123] Ugljeå¡a Grusic,'The Evolving Jurisdiction of the International Centre for Settlement of Investment Disputes' [2009] The Journal of World Investment and Trade P.73.
[124] ICSID convention, (n 122), art 26
[125] Ibid, art 27 of the ICSID convention.
[126] Ugljeå¡a Grusic, (n 123) P.73
[127] ICSID convention, (n 122), art 25(4)
[128] Ethiopia-Brazil BIT, (n 120), art 24(3)
[129] Agreement Between the Government of the Federal Democratic Republic of Ethiopia and the Government of the People's Republic of China Concerning the Encouragement and Reciprocal Protection of Investments (Signed 11 May 1998, entered into force 01 May 2000) art 9(2)
[130] Ibid.

and Algeria[131], Austria[132], Belgian-Luxemburg economic Union[133] , Denmark[134], Deutschland[135] Finland[136], France[137] , Iran[138], Israel[139], Kuwait[140], Malaysia[141], Netherland[142], Qatar[143], Russia[144], South Africa,[145]Spain[146], Sudan[147], Tunisia[148], Turkey[149], and Yemen[150], signed in their

[131] Agreement Between the Government of The Federal Democratic Republic of Ethiopia and The Government of The People's Democratic Republic of Algeria on The Reciprocal Promotion and Protection of Investments (Signed 04 June 2002, entered into force 01 November 2005) art 9(2)

[132] Agreement between the Republic of Austria and the Federal Democratic Republic of Ethiopia for the Promotion and Protection of Investments (Signed 12 December 2004, entered into force 01 December 2005) art 12(1)

[133] Agreement Between the Belgian-Luxembourg Economic Union, On the One Hand, And the Federal Democratic Republic of Ethiopia, On the Other Hand, On the Reciprocal Promotion and Protection of Investments (Signed 26 October 2006) art 11(2)

[134] Agreement between the Federal Democratic Republic of Ethiopia and The Kingdom of Denmark Concerning the Promotion and Reciprocal Protection of Investments (Signed 24 April 2001, entered into force 21 August 2005) art 9(2)

[135] Treaty between the Federal Republic of Germany and the Federal Democratic Republic of Ethiopia concerning the Encouragement and Reciprocal Protection of Investments (Signed 21 April 1964) art 11(2)

[136] Agreement between the Government of the Republic of Finland and the Government of the Federal Democratic Republic of Ethiopia on the Promotion and Protection of Investments (Signed 23 February 2006, entered into force 03 May 2007) art 9(2)

[137] Agreement Between the Government of The Federal Republic of Ethiopia and The Government of The Republic of France for The Reciprocal Promotion and Protection of Investments (Signed 25 June 2003, entered into force 07 March 2004) art 9

[138] Agreement On Reciprocal Promotion and Protection of Investments Between the Government of The Federal Republic of Ethiopia and The Government of The Islamic Republic of Iran (Signed 21 October 2003, entered into force 15 December 2004) art 12(2)

[139] Agreement Between the Government of The Federal Democratic Republic of Ethiopia and The Government of The State of Israel for The Reciprocal Promotion And. Protection of Investments (Signed 26 November 2003, entered into force 15 February 2006) art 8(2)

[140] Agreement Between the Federal Democratic Republic of Ethiopia and the State of Kuwait for the Encouragement and Reciprocal Protection of Investments (Signed 14 September 1996, entered into force 12 November 1998) art 9(2)

[141] Agreement Between the Government of The Federal Democratic Republic of Ethiopia and The Government of Malaysia for The Promotion and Protection of Investments (Signed 22 October 1998, entered into force 04 June 1999) art 7(2)

[142] Agreement on encouragement and reciprocal protection of investments between the Federal Democratic Republic of Ethiopia and the Kingdom of the Netherlands the Federal Democratic Republic of Ethiopia and the Kingdom of the Netherlands (Signed 16 May 2003, entered into force 01 July 2005) art 9(2)

[143] Agreement Between the Government of The Federal Democratic Republic of Ethiopia and the government of the state of Qatar for The Promotion and Reciprocal Protection of Investments (Signed 14 November 2017) art 16(2)

[144] Ethiopia- Russian BIT, (n 121), art 8(2)

[145] Agreement Between the Government of The Federal Democratic Republic of Ethiopia and The Government of The Republic of South Africa for The Promotion and Reciprocal Protection of Investments (Signed 18 March 2008) art 7(1)

[146] Agreement Between the Federal Democratic Republic of Ethiopia and The Kingdom of Spain on The Promotion and Reciprocal Protection of Investments (Signed 17 March 2009) art 11(2)

[147] Agreement Between the Government of The Federal Democratic Republic of Ethiopia and The Government of The Republic of The Sudan on The Reciprocal Promotion and Protection of Investment (Signed 07 March 2000, entered into force 15 May 2001) art 9(2)

[148] An Agreement Between the Government of The Federal Democratic Republic of Ethiopia and The Government of The Republic of Tunisia for The Promotion and Protection of Investments (Signed 14 December 2000, entered into force 02 October 2004) art 7(2)

[149] Agreement Between the Republic of Turkey and The Federal Democratic Republic of Ethiopia Concerning the Reciprocal Promotion and Protection of Investments (Signed 16 November 2000, entered into force 10 March 2005) art 7(2)

Investment Dispute Settlement provisions if the dispute between an investor and the country cannot be settled amicably, the dispute would have been submitted for settlement by arbitration to the organizations Chosen by the parties at the option of the investor. Ethiopia does not have such an option and the provisions of the Ethiopia BIT would make it far easier for companies to sue governments before arbitration tribunals.

The BITs of Ethiopia with Brazil, China, Egypt, Germany, India, Libya, and the United Arab Emirates in their investment dispute settlement provisions Provide that, if the dispute cannot be settled amicably it may be submitted upon the request of the party concerned or either contracting parties to international arbitration, an ad hoc arbitral tribunal set up in accordance with the arbitration rules of UNCITRAL, ICSID, ICSID additional facilities or the International Chamber of Commerce as all are mentioned in many of Ethiopia's BITs.

3.3.3 Exhaustion of local remedies

A Contracting State may give its consent subject to conditions and Conditions to consent usually require certain procedural steps to be exhausted before the commencement of arbitration proceedings.[151] As a condition of its agreement to arbitrate with the center, a Contracting State may request the use of all available domestic administrative or judicial remedies.[152]

Nearly all Ethiopian BITs often have a clause stating that before turning to international arbitration, investors shall first attempt to settle the conflict amicably through negotiation, conciliation, and arbitration. However, the investors are typically not obligated to resolve the conflict amicably. Ethiopia-China BIT under Article 9(1) provides;

As much as feasible, any dispute involving an investment in the territory of the other Contracting Party between an investor of one Contracting Party and the other Contracting Party shall be resolved amicably by negotiation between the parties to the dispute.

In other BITs too the requirement to try amicable means is qualified by the phrases such as, 'whenever possible[153], or 'if possible'[154] and the investor is not under obligation to exhaust local remedies before resorting to the ICSID arbitration.

However, in some BITs, the investor should seek negotiation before resorting to international arbitration. For example, the Ethiopia-Israel Bilateral Investment Treaty (BIT) stipulates that negotiations should be used to resolve any investment disputes between a Contracting Party and the investor.'[155] The investor should stay off on exploring alternative options for six months after the negotiation started.[156] Article 9(1) and (2) of Ethiopian Finland Bit Provides any dispute arising

[150] Agreement Between the Government of The Federal Democratic Republic of Ethiopia and The Government of The Republic of Yemen on The Reciprocal Promotion and Protection of Investment (Signed 15 April 1999, entered into force 15 April 2000) art 9(2)
[151] Ugljeå¡a, (n 123), P.74
[152] ICSID convention, (n 122), art 26
[153] Ethiopia- Netherland BIT, (n 142), art 9(1)
[154] Ethiopia- Denmark BIT, (n 134), art 9(1)
[155] Ethiopia- Israel BIT, (n 139), art 9(1)
[156] Ibid, art 9(2)

directly from an investment should be resolved amicably between one Contracting Party and an investor of the other Contracting Party. And if the dispute has not been settled within three (3) months from the date on which it was raised in writing, the dispute may, at the choice of the investor, be submitted to the chosen arbitration organizations.

Under the BIT between Austria and Ethiopia, it is indicated that the fact that the Contracting Parties submitted their consent by treaty indicates a waiver of the need to use all available internal administrative or judicial remedies.[157]

Exceptionally, Article 9(3) of Ethiopia and Tunisia BIT provides that, the investor shall be entitled to submit the dispute to ICSID or UNCITRAL only if: the dispute has not been submitted by investors for resolution under any applicable previously agreed dispute settlement procedures, and 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 involved in the litigation.

Unless the domestic court granted a final ruling, the investor may still bring his claim to international arbitration despite having already filed it with a national court. Article 8(4) of Ethiopian-Israel BIT Unless otherwise agreed, an investor who has submitted the dispute to national jurisdiction may have recourse to the arbitral tribunals mentioned so long as a judgment has not been delivered on the subject matter of the dispute by a national court. In the BIT between Ethiopia-Finland, an investor who has submitted the dispute to a national court may also have recourse to one of the arbitral proceedings mentioned in the treaty if, before a judgment has not been delivered on the subject matter by a national court and the investor declares not to submit the case to national courts or withdraws the case.[158]

If an investor from the Federal Republic of Germany has seized a local court in the Federal Democratic Republic of Ethiopia, the dispute can be submitted to international arbitration only if the local court has not yet rendered a decision that finally disposes of the case.[159] Also, in this case, the dispute can be submitted to ICSID if the local court has not yet rendered a decision.

The parties' agreement to the ICSID arbitration precludes the investor from using any alternative remedy, even though the investor's submission of his claim to the national court does not restrict him from doing so.[160] No Contracting State shall provide diplomatic protection or file an international claim in relation to a dispute where one of its nationals and another Contracting State consented to submit or submit to arbitration under the Convention after the international arbitration has begun.[161]

In general, in most Ethiopia BITs there is no indication that the investor should exhaust local remedies before resorting to an international arbitration tribunal and before resorting to ICSID jurisdiction, parties to the dispute are not necessarily under obligation to try amicable means.

[157] Ethiopia- Austria BIT, (n 132), art 13(2)
[158] Ethiopia- Finland BIT, (n 136), art 9(3)
[159] Ethiopia- Germany BIT, (n 135), art 11(3)
[160] ICSID convention, (n 122), art 26
[161] Ibid, art 27(1)

3.3.4 consent toward the jurisdiction of the ICSID center under the BITs of Ethiopia

The dispute settlement mechanism established under the Convention involves two separate legal relationships of a different nature, each of which requires a different kind of consent. Thus, the requirement of "dual consent" is one of the unique features of ICSD arbitration.[162] The first legal relationship is established among States that have ratified the Convention to become the Contracting States. Ratification represents the consent of a State to be bound by obligations established by the Convention, such as to refrain from giving diplomatic protection in respect of disputes brought by one of its nationals against another Contracting State or must uphold and execute an ICSD award as though it were a final judgment from that State's courts. [163]This is consent according to Arts 67 and 68 of the Convention. The second legal relationship is established between an investor and a host State, parties to a particular dispute, and Ratification of the Convention by a State imposes no obligation on the State nor its nationals to use the facilities of the Centre. [164]

The Contracting States and their citizens are free to choose whether to accept the Centre's jurisdiction and, if so, to what extent. That is why the parties' consent is referred to as "the cornerstone of the jurisdiction of the Centre."[165] Such consent may be contained in the host State's investment promotion legislation or in bilateral and multilateral investment treaties whereby the investor's home state and the host state are parties.[166]

Under the BITs of Ethiopia with various countries, in a provision that deals with the settlement of investment disputes different way of expression of consent to ICSID jurisdiction is provided. The clause that deals with the resolution of investment disputes between the investor and host state is provided under Article 8 of the treaty signed with the UAE and Ethiopia. The treaty's Articles 15/3 and /4 particularly address the investor's right to international arbitration. It provides;

Either party to the dispute has the right to take it before national or international arbitration tribunals if the disagreement cannot be resolved within six months of referring to a court or administrative tribunal. The investor and the Contracting Party involved in the dispute may decide to submit the matter to any of the following institutions:

- *a) The International Centre for the Settlement of Investment Disputes and the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings/;*
- *b) The Arbitration Court of the International Chamber of Commerce; or*
- *c) An international arbitrator or ad hoc arbitration to be appointed by a special agreement or formed under the Arbitration Rules of the UNCITRAL;*
- *d) The dispute will, at the written request of the involved investor, be brought to arbitration under the UNCITRAL rules that are in effect at the time, if after three months from the*

[162] Ugljeå¡a, (n 123), P.71
[163] Ibid.
[164] Ibid.
[165] Ibid.
[166] Ibid P.72.

written notification of the claim there is no agreement to one of the above alternative procedures specified.

In Ethiopia-UAE BIT the choice to refer a dispute to a different forum is left to the investor and further agreement of the contracting parties. The BIT contains multiple alternatives along with ICSID, and therefore, depending on the nature of the dispute, the parties could have many choices.

Article 9 of the treaty between India and Ethiopia contains the clause that deals with the resolution of investment disputes between the investor and the host state. As a result, if a dispute arises between an investor from India and an investor from Ethiopia, and if the dispute hasn't been resolved within six months of the date either party to the dispute requested an amicable resolution, the dispute may be submitted for resolution to any of the arbitration systems provided under Article 9/2/a & b of the treaty, as well as to the appropriate court of the contracting party in the territory where the investment was made or to an international conciliation body (UNCITRAL). If both Contracting Parties are signatories to the convention and the investor agrees to submit the dispute to the center, it may be referred to the ICSID center or under the Rules Governing Additional Facility for the Administration of Proceedings by the Secretariat of the center, and an international ad hoc arbitral tribunal by the Arbitration Rules of the UNCITRAL. Under a treaty between India and Ethiopia, the expression of consent is clear, it indicates that the center may exercise jurisdiction over a dispute if both parties are Convention members and the investor agrees to refer the case to the Center.

The agreement between the Federal Republic of Germany and the Federal Democratic Republic of Ethiopia can be justified using the same logic. Investment disputes involving one of the Contracting Parties and an investor of the other Contracting Party must, to the greatest extent feasible, be resolved amicably between the parties.[167] The investor may request that the dispute be brought before the competent courts of the Contracting Party in whose territory the investment was made and an ad hoc tribunal that has been established in accordance with the Arbitration Rules of the UNCITRAL if the dispute cannot be resolved within six months of the date on which it was raised by one of the parties to the dispute. The dispute could be brought before either the Additional Facility in accordance with the Rules Governing the Additional Facility for Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes, where at least one Contracting Party is a member of the Convention, or the International Centre for Settlement of Investment Disputes, where both Contracting Parties are members of the Convention..[168]

Any disagreement over investments made between a national of one Contracting Party and a corporation of the other Contracting Party must be resolved amicably between the two parties in accordance with the Ethiopia and Finland BIT.[169]If the dispute has not been settled within three months from the date either Party to the dispute requested amicable settlement, the dispute may

[167] Ethiopia- Germany BIT, (n 135), art 11(1)
[168] Ibid, art 11(2)
[169] Ethiopia- Finland BIT, (n 136), art 9(1)

at the choice of the investor, be submitted to the competent court of the Contracting Party; arbitration by the ICSID center, if it is available.[170]

In accordance with the BIT, the investor may choose to submit the disagreement to the center if it is available. Contrary to other BITs, this one does not make the accession of both parties to the convention a requirement for ICSID jurisdiction. Therefore, a dispute could only be submitted to ICSID if the center was accessible. If the center is available, it is unclear what that means, which makes the provision open to interpretation.

Generally, under Ethiopia BITs consent to ICSID jurisdiction is expressed in different forms. In some of the BITs, expressions of consent to ICSID jurisdiction are clear and 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. While Other BITs contain clauses that provide consent to agree to ICSID jurisdiction. Under those BITs, parties are required further agreement to consent to the jurisdiction of the ICSID center.

Chapter Four

Assessing the pros and cons of Ratification of the ICSID convention for Ethiopia

4.1 Introduction

Investor-state dispute settlement (ISDS) is the legal mechanism that allows multinational corporations a forum, other than the court system of the country in which the dispute arose to arbitrate a controversy between a corporation and the host country.[171] Treaties negotiated by the signatories, the government of the host country, and the country in which the corporation is incorporated, allow corporations to use the ISDS system instead of the host country's domestic court system. A host state may also provide an ISDS tribunal jurisdiction over a dispute by enacting legislation that gives it that power or by agreeing to use that forum in a contract with the investor.[172] The World Bank's International Centre for Settlement of Investment Disputes (ICSID) is the organization most frequently employed to oversee ISDS and develop model regulations.[173] It is the most popular multilateral arbitration system in the world since it has the most state signatories when compared to other comparable treaties. [174] The bulk of all known international investment conflicts have been resolved by ICSID, which is a testament to its popularity. As of December 31, 2021, ICSID had registered 869 cases under the ICSID Convention and Additional Facility Procedures.[175]

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[170] Ibid, art 9(2)
[171] Emily Osmanski, 'Investor-State Dispute Settlement: Is There a Better Alternative?' (2018) 43 Brooklyn Journal of International Law P.639
[172] Ibid
[173] Ibid P.640
[174] Gautami S. Tondapu, 'International Institutions and Dispute Settlement: The Case of ICSID' (2010) 22 Bond Law Review P. 89
[175] The ICSID Caseload – Statistics, < https://icsid.worldbank.org/resources/publications/icsid-caseload-statisticsIissue 2022> accessed 16 June 2022

Despite the growing participation of states in ICSID, there is also a growing concern that the Center inequitably prioritizes the protection of investors' rights. There is also a criticism that, ICSID lacks the transparency of arbitral proceedings; high arbitral costs, exclusion of national courts to the unsatisfactory nature of annulment proceedings, and absence of an appellate system.

Although Ethiopia is not a party to the convention, most of its Bilateral Investment Treaties (BITs) accept ICSID jurisdiction. Thus, the main purpose of this chapter is to examine the cost and benefit of ratification of the ICSID convention for Ethiopia and aims to analyze the potential consequences that Ethiopia may encounter if it ratifies the ICSID Convention. The chapter also assesses chiefly the arguments forwarded against and in favor of ICSID by developing countries, Criticisms, and withdrawals from the ICSID System and forwards a conclusion on the cost .and benefit analysis.

4.2 Benefits of ICSID from legal Perspectives

4.2.1 Absence of national court's involvement in the arbitration process of ICSID

One of ICSID's key contributions to the resolution of investment disputes is its capacity to bar international investors' home countries from formally taking part in the dispute once it has been brought to ICSID.[176] A Contracting State has the right to require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under the Convention as provided in Article 26 of the convention. However, unless otherwise stated by the parties to the agreement, the parties' consent to arbitration under the ICSID Convention shall be deemed consent to such arbitration to the exclusion of any other remedy.[177]

The ICSID Convention views the exclusion of diplomatic protection for foreign investors as being vital to strike a balance between the interests of powerful capital-exporting governments and their citizens who invest overseas, as well as those of Third World states.[178] According to Article 27 of the Convention, Contracting Parties are not permitted to provide diplomatic protection or file an international claim in relation to a dispute that one of their nationals and another Contracting State have agreed to arbitrate or have already submitted to arbitration under the ICSID Convention. However, the Contracting State has the right to withhold its full agreement at any point after the Convention has been ratified, accepted, or approved by notifying the Centre of the class or classes of conflicts that it would or would not consider subjecting to the jurisdiction of the Center.[179]

One method the ICSID mechanism helps to depoliticize investment disputes is by suspending the entitlement to diplomatic protection under the ICSID Convention. A fundamental goal of the IC-

[176] Ibironke T. Odumosu, 'The Antinomies of the (Continued) Relevance of ICSID to the Third World' (2007) 8 San Diego Int'l L.J. P.370
[177] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) ('ICSID Convention') art 26
[178] Ibid
[179] Ibid, art 25(4)

SID system is the depoliticization of such conflicts, which aims to foster trust between States and foreign investors and increase the flow of resources to poor nations.[180]

4.2.2 Flexibility of the ICSID system

The rules applicable to ICSID proceedings are flexible in the sense that the parties may derogate from them to meet their particular needs. For instance, the majority of the clauses governing the quantity of arbitrators and the process for choosing them are permissive and only apply in the absence of an agreement between the parties.[181] The Convention allows the parties to nominate conciliators and arbitrators outside of the Panels in line with the essentially flexible nature of the processes[182] but it also stipulates that these individuals must be highly qualified and competent to exercise independent judgment.[183] The Convention ensures that the process won't be hampered by a party's desire to cooperate or a lack of agreement among the parties on these topics, despite the fact that it grants the parties a great deal of authority in the establishment of commissions and tribunals.[184]

Article 63 of the Convention provides that Conciliation and arbitration proceedings may be held outside the seat of the center, If the parties agree, the arbitration will take place in the Permanent Court of Arbitration's office, any other institution that is suitable—whether private or public—with which the Center can make arrangements for that purpose, or at any other location that has been allowed by the Commission.[185]

The parties' choice of law must be applied by an Arbitral Tri-bunal in accordance with the consensual nature of procedures under the Convention. In the absence of such an agreement, the Tribunal must apply both applicable international law norms as well as the law of the State party to the dispute (including its rules on conflicts of laws).[186] Thus, the ICSID system gives priority to the parties regarding the Choice of arbitrators, Place of Proceedings, and choice of applicable law but in the absence of such agreement, ICSID has its own mandatory rules of procedure.

4.2.3 ICSID's Voluntary Character

ICSID's facilities are available voluntarily.[187] While no Contracting State may be the subject of conciliation or arbitration proceedings without that State's consent and no Contracting State is required to consent to such processes, if the parties have once provided their approval, no party

[180] Shihata, Ibrahim F.I.,' The Settlement of Disputes Regarding Foreign Investment: The Role of the World Bank, with Particular Reference to ICSID and MIGA.' (1986) 1 American University International Law Review P.103
[181] Ibid P.104
[182] ICSID convention, (n 177), art 31(2) ,40(2)
[183] Ibid, art 14(7)
[184] ICSID Convention, Regulation and Rules < http://icsidfiles.worldbank.org/icsid/ICSID/StaticFiles/basicdoc/partB-section06.htm> accessed 8 June 2022
[185] ICSID convention, (n 177), art 63
[186] Ibid, art 42(1)
[187] Shihata, Ibrahim F.I., (n 180), P.103

may unilaterally withdraw that consent.[188] Even the act of ratification of the ICSID Convention is only an expression of a Contracting State's willingness, in principle, to make use of the ICSID machinery. Ratification does not constitute an obligation to use that machinery. Only once the concerned Contracting State has explicitly consented to submit to ICSID arbitration can that obligation come into existence.[189]

ICSID Convention gives more freedom to the contracting states to determine whether a transaction is suitable for ICSID arbitration than might be assumed from the limitation of the Centre's jurisdiction to investment disputes of a legal character. At the time of ratification, acceptance, or approval of the Convention or at any time subsequently, if they so desire, the Contracting States may make known to the Centre the kinds of disputes that they would or would not consider referring to the Centre, according to Article 25(4).[190] Any Contracting State is free to refuse or denounce ICSID by sending a written notice to the ICSID depositary. Six months after receiving such notice, the denunciation becomes effective.[191]

4.2.4 Effectiveness of the ICSID System

The exclusivity of the ICSID system contributes to its effectiveness. Under the ICSID Convention, consent of the parties to ICSID arbitration is deemed to be exclusive of any other remedy, unless the parties agree otherwise.[192] One of the many effects of this rule is that ICSID hearings are exempt from all judicial oversight or interference in all Contracting States.[193] While parties are free to decide whether to make use of the ICSID machinery, the ICSID Convention assures both parties that once they have consented to submit disputes to ICSID conciliation or arbitration, neither party can unilaterally revoke its consent.[194]

The other factor which accounts for the effectiveness of the ICSID system is the automatic recognition and direct enforceability of ICSID awards. Each Contracting State is required to uphold the financial obligations imposed by an award made under the Convention inside its borders as if it were a final judgment rendered by a court within that State. A contracting state with a federal constitution may enforce an award in its federal courts or through those courts, and those courts may be instructed to treat the award as if it were a final decision issued by the courts of a constituent state.[195] Moreover, refusal by the State involved to comply with an ICSID award would deprive it of credibility in the international business community. This is not a risk that a State would be likely to assume lightly. ICSID arbitration thus offers a degree of finality which,

[188] ICSID convention, (n 177), art 25(1)
[189] Shihata, Ibrahim F.I., (n 10), P.103
[190] ICSID convention, (n 177), art 25(4)
[191] Ibid, art 71
[192] Shihata, Ibrahim F.I., (n 180), P.105
[193] Ibid
[194] ICSID convention, (n 177), art 25(1)
[195] Ibid, art 54(4)

combined with the relatively low cost of ICSID arbitration, makes it an attractive alternative to other forms of international arbitration. [196]

Enforcement of arbitral awards is addressed in Article 54 of the ICSID Convention. Awards issued by ICSID tribunals have been perceived to be easily enforceable, which is a key factor in ICSID's efficacy.[197]

ICSID has also a unique feature in terms of enforcement mechanisms. Articles 53, 54, and 55 discuss unusual facets of recognizing and enforcing an award made in accordance with the Convention. The ICSID award is final and has binding effect. Therefore, without the right to appeal, each contesting party is required to abide by and comply with the provisions of the award. Additionally, the award shall be recognized by and enforced by all ICSID contracting states as if it were a final judgment of a domestic court. As a result, the ICSID judgement is final, immune from review by domestic courts, and has greater scope for execution across the territory of the contracting nations.

The ICSID Convention offers a self-contained system for resolving investment disputes in which the ICSID Convention is the only source of regulation for all aspects of arbitral proceedings and is explicitly and completely independent of any legal system. This system is supplemented by a set of institutional rules. The efficiency of non-ICSID arbitration, on the other hand, is based, in theory, on a patchwork of international and domestic regulations. Depending on the appropriate legal system at the arbitral location, different procedural procedures apply to non-ICSID adjudicatory proceedings in terms of lex arbitri.[198] The application of lex arbitri extends to post-award remedies and the enforcement procedure, where national courts at the venue of the arbitration have the authority to review arbitral awards under national statutes, while national courts before whom enforcement is sought have broad discretionary authority under national statutes or conventions to challenge the enforcement of awards.[199]

4.2.5 Institutional Support

When choosing arbitrators and managing the arbitration process, ICSID offers institutional support. The ICSID standard provisions and rules of procedure offer institutional backing for the conduct of the processes, ensure that they won't be obstructed, and make it easier to recognize and enforce the award.

The ICSID Convention, the Rules for Institution of Conciliation and Arbitration Proceedings (the Institution Rules), the Administrative and Financial Regulations, the Rules for Conciliation Proceedings (the Conciliation Rules), and the Rules for Arbitration Proceedings (the Arbitration Rules), as amended effec-

[196] Shihata, Ibrahim F.I., (n 180), P.105
[197] Wick, Diana Marie, 'The Counter-Productivity of ICSID Denunciation and Proposals for Change' (2012) 11 Journal of International Business & Law 2 p.259
[198] Li, Fenghua,'The divergence and convergence of ICSID and non-ICSID arbitration' (PhD thesis, University of Glasgow 2014) P.243
[199] Ibid, P.34

tive January 1, 2003, adopted by the Admi.[200]The Secretariat is also responsible for overseeing individual disputes on a day-to-day basis, providing institutional support for the initiation and conduct of ICSID proceedings.[201]

Besides providing facilities for conciliation and arbitration under the ICSID Convention, ICSID member states have access to specialized international investment dispute settlement under the ICSID additional facility rules. According to the ICSID's Additional Facility Rules, the ICSID Secretariat is permitted to oversee arbitration and conciliation processes in cases in which one party is neither a citizen of a Contracting State nor a Contracting State itself.[202] The Additional Facility Rules further allow ICSID to administer a type of proceedings not provided for in the ICSID Convention, namely fact-finding proceedings to which any State and foreign national may have recourse if they wish to institute an inquiry "to examine and report on facts". [203]

Additionally, members of ICSID receive ongoing assistance in all issues connected to membership from first expressions of interest to signing and as contracting states from the ICSID Secretari-at..

4.2.6 Balance of Interests of the ICSID system

The arrangements made for ICSID's Administrative Council reflect the balance of interests. Each Contracting State has a representative on the Administrative Council.[204] Every Administrative Council member has one vote, and every issue before the Council is settled by a majority of the cast votes, unless otherwise stipulated by the convention.[205] The existence of one representative of each Contracting State on the Council, and, as each representative casts one vote, the ICSID Convention assures equal representation for all Contracting States.[206] ICSID's Administrative Council, the institution's governing body with a one-representative-per-country quota and equal voting rights for each, is also regarded by commentators as reflecting fair representation for all contracting states and a balance of interests.[207]

One of ICSID's key contributions to the resolution of investment disputes is its capacity to bar international investors' home countries from formally taking part in the dispute once it has been brought to ICSID.[208] According to the ICSID Convention, excluding diplomatic protection for foreign investors is necessary to strike a balance between the interests of powerful capital-exporting nations and their citizens who invest overseas and those of Third World countries.[209]

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[200] Mary Anyango Oganga, 'The International Centre for the Settlement of Investment Dispute: Jurisdiction and Relevance to Africa' (Masters of Laws Thesis, University of Nairobi 2007)
[201] ICSID convention, (n 177), art 11
[202] Anyango, (n 200), p.1
[203] Ibid
[204] ICSID convention, (n 177), art 4(1)
[205] Ibid, art 7(2)
[206] Shihata, Ibrahim F.I., (n 180), P.101
[207] Ibironke T. Odumosu (n 176), P.370
[208] Ibid
[209] Ibid

The ICSID Convention gives private investors direct access to an international forum. Moreover, provisions of the ICSID rules, assure investors that refusal or abstention by the State party to the dispute to participate in the proceedings after it has consented to ICSID arbitration cannot frustrate the ICSID arbitral process.[210] In contrast to the benefits for investors, the ICSID Convention states that a Contracting State may require prior exhaustion of local remedies as a condition of its assent to ICSID arbitration.[211] To strike a balance between the interests of powerful capital-exporting governments and their citizens who invest overseas and those of Third World states, diplomatic protection of foreign investors must be excluded.

4. 3 The Administrative and Substantive Benefits of ICSID

4.3.1 Administrative Benefits

4.3.1.1 The Role of the Secretariat

For a State, the function of a secretariat in investment arbitration can have significant benefits. This is especially true with ICSID, whose Arbitration Rules focus on Investor-State Arbitration and whose Convention makes specific concessions for States to participate in the Arbitration Facility's operations.[212]

The role of a secretariat in the ICSID arbitration center is to administer and facilitate the arbitral process.[213] The screening authority of the ICSID Secretary General is one of the substantive case-related administrative tasks of the ICSID Secretariat, which may constitute a distinction between ICSID and non-ICSID arbitration. In accordance with a special power granted by the ICSID Convention, the Secretary-General may decline to register an arbitration request if he or she determines, based on the information in the request, that the dispute is obviously outside the Cen-jurisdiction.[214] The ICSID Secretariat's screening power helps to protect against time, money, and effort waste, eliminates embarrassment for a respondent, and further helps to ensure the legitimate use of the Centre's facilities by preventing frivolous cases against States that lack legal foundation.[215]

In numerous arbitration institutions that are not affiliated with ICSID, the screening power is also an administrative duty. If the Secretary-General submits the impact of an arbitration agreement to the Court, for example, the ICC Court will determine whether and how far the arbitration will proceed.[216]

First off, the ICSID Secretary-General exercises the screening power purely based on the information in the request, demonstrating that, in contrast to the majority of non-ICSID arbitration tribunals, the ICSID Secretariat makes decisions devoid of the respondent's input or objec-

[210] Shihata, Ibrahim F.I., (n 180), P.101
[211] Ibid
[212] Larisa Babiy, Adam Czewoja Sheikh, Blerina Xheraj., Should Mexico join ICSID? (2012) 88 Graduate Institute of International and Development Studies Working Paper P.21
[213] ICSID convention, (n 177), art 11
[214] Li, Fenghua, (n 198), p.80
[215] Ibid, p.84
[216] Ibid, p.81

tions.[217] Second, the Secretariat's screening authority in non-ICSID arbitration is more flexible. The grounds for rejecting a request for arbitration in the Rules of ICC and SCC are quite general and place a particular emphasis on the resolution of international commercial disputes, so it appears that they are unclear as to how to exercise the screening power when chosen as the governing rules for investor-State dispute cases.[218] The ICSID Secretariat's screening power, limited as it is, is nevertheless of significant administrative importance. The role of gatekeeper that the ICSID Secretariat serves essentially sets up a jurisdictional threshold to efficiently filter utterly unworthy disputes that manifestly fail to comply with the requirements set out in Article 25(1) of the Convention from the disputes that are, substantially or potentially, meritorious.[219]

Contrary to the ICC, the ICSID Secretariat does not get involved in the substance of the proceedings, such as deciding whether an arbitrator's challenge will succeed or fail, or scrutinizing, rendering, reviewing, or nullifying a judgment. The Tribunal, which is either chosen by the parties or, in some situations, nominated by the Secretary-General, is left in charge of making the most important legal decisions under this procedure, which guarantees impartiality and openness.[220]

In any case, it is tenable to say that ICSID arbitration is largely distinguishable from UNCITRAL arbitration and non-ICSID institutional arbitration by the ICSID Secretariat's exclusive power. Thus, the Secretariat's function aids in efficiently vetting claims, easing the proceedings' prompt conclusion, and fostering openness and confidence in the investment arbitration process.[221] Ethiopia would gain from ratifying the ICSID convention for these factors.

The power to designate arbitrators and councilors to the ICSID Panels, as well as influence on Center operations and governance, are further advantages of Ethiopia joining the Organization as a contracting state.[222] Through representation on the Administrative Council, Ethiopia is also allowed to take part in the institution's rules of procedure, its administrative and budgetary regulations, and the general operations of the Secretar-iat.[223]

4.3.1.2 Appointment of Arbitrators

In contrast to other arbitration facilities, ICSID arbitration gives parties a more transparent way to choose arbitrators for a tribunal and gives the State more power to influence the arbitrators' selection in court.[224] The Tribunal shall consist of a single arbitrator or an odd number of arbitrators chosen by the parties.[225] If the Tribunal has not been constituted within 90 days after notice of registration of the request has been sent by the Secretary-General in accordance with paragraph (3) of Article 36, or within such other period as the parties may agree, the Chairman shall,

[217] Ibid
[218] Ibid ,p.82
[219] Ibid, p.84
[220] Larisa Babiy, Adam Czewoja Sheikh, Blerina Xheraj, (n 212), P.22
[221] Ibid, p.23
[222] Ibid
[223] ICSID convention, (n 177), art 6 and art 11
[224] Larisa Babiy, Adam Czewoja Sheikh, Blerina Xheraj, (n 212), P.27
[225] ICSID convention, (n 177), art 37(2) (A)

at the request of either party and after consulting both parties as much as possible, appoint the arbitrator or arbitrators who have not yet been appointed.[226]

With the exception of 10, who are proposed by the Secretary-General, the Panel of Arbitrators under the ICSID Convention is only chosen by the Contracting States .[227]As a result, the roster will generally consist of individuals who are preselected and considerate of State interests and perspectives. Under the ICSID Additional Facility Rules, parties are not obligated to choose arbitrators from this pre-selected roster.[228]

Ethiopia would then be able to select from a list of arbitrators who have already been pre-selected and are considerate of the State's particular concerns. Ethiopia could limit the pool from which arbitrators are chosen and ensure that they are held to the high standards stipulated in the ICSID Convention by ratifying the Convention.

Additionally, under ICSID arbitration, parties can appoint arbitrators to the Arbitration Panel without the consent or involvement of the Secretariat, in contrast to how arbitrators are chosen in ICC proceedings. This gives States the chance to choose arbitrators free from outside interference, which may boost public trust in the arbitration facility and, in turn, the arbitration process. When dealing with politically sensitive or widely publicized situations, this is crucial for States.[229]

4.3.1.3 Applicable Laws

In most cases, parties choose the law that will apply to disputes and include explicit choice-of-law provisions in their IIAs. Different Arbitration Rules, however, offer remedies in situations where parties do not expressly choose the governing law in their agreements.[230]

The ICSID Convention requires the Tribunal to decide a dispute using any legal standards that the parties may have agreed upon. In the absence of such an agreement between the parties, the Tribunal abides by the law of the Contracting State party to the dispute (including its rules on conflict of laws) and any applicable international laws principles.[231] An arbitral tribunal cannot reach a conclusion of non-liquet, according to Article 42(2). According to Article 42(3), an arbitral tribunal may only apply equity principles with the parties' consent.

Second, the absence of rules that have been agreed upon by the parties requires the tribunals to determine the relevant laws. The tribunal will only take into consideration applying the law emerging from the conflict of law issues and international rules that it believes to be applicable in their absence. This is where the first difference with ICSID becomes apparent. There is no obligation to mention the host state's laws. [232]

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[226] Ibid, Article 38 of the Convention
[227] Ibid, Art 12 and 13(2) of the Convention
[228] Larisa Babiy, Adam Czewoja Sheikh, Blerina Xheraj, (n 212), P.28
[229] Ibid
[230] Ibid
[231] ICSID convention, (n 177), art 42(1)
[232] Larisa Babiy, Adam Czewoja Sheikh, Blerina Xheraj, (n 212), P.36

The conflict of law rule is not mentioned in UNCITRAL, ICSID, or ICSID/AFR; instead, the tribunal will apply the law "which it determines to be appropriate." It appears that the tribunal's discretion has been expanded; in the absence of the parties' choice, its decision is not subject to any requirement for the determination of the applicable law.[233]

The issue of appropriate law is covered in Article 33 of the PCA Rules. In contrast to the set of rules previously examined, the PCA text on applicable law refers to "conflict of laws" regulations and holds ex aequo et Bono judgments to the "applicable law of process." In terms of the latter issue and the former, this component makes PCA rules equivalent to ICSID/AF and to ICSID and ICSID/AF, respectively. Another distinguishing characteristic of PCA is its use of the term "Law," as determined by the parties, rather than "rules of law," which suggests a preference for a certain legal system.[234]

The applicable laws for a particular claim are more or less cognate regardless of the forum that was chosen, especially in light of the fact that investment treaties and other pertinent laws would be applied equally in ICSID and non-ICSID arbitration. In light of the aforementioned, Ethiopia loses nothing from joining the ICSID Convention.

4.3.1.4 Provisional Measures

Unless the parties agree otherwise, the Tribunal may advise any temporary measures that should be put in place to protect the respective interests of either party in accordance with the ICSID norm.[235] The concern of a contracting state would be that the use of this power would result in a limitation of its sovereign rights. The powers of ICSID tribunals in issuing interim remedies are fairly comprehensive. However, because it only applies to "recommendations" and not "orders," as with other arbitration rules, this power is significantly diminished.[236] The types of provisional measures that may be used in ICSID arbitration are not specified, nor are there any specific requirements that must be met for issuing them.[237]

The responsibility to convince the tribunal that: no reparable harm is likely to arise if the remedy is not ordered; and there is a reasonable likelihood that the party will succeed on the merits of the claim is imposed on the party requesting an intermediate measure by Article 26(3) UNCITRAL rules. UN-CITRAL The power to "issue injunctions and order preservation of evidence" is included in Article 26(2) of the Rule, which expands the arbitral tribunal's authority beyond the maintenance of the status quo.

In accordance with Article 26(8), the party who receives a provisional measure that was improperly granted is obligated to pay damages. This is unquestionably to the benefit of host nations, who may be subject to temporary restrictions imposed by investors for actions committed on their soil. It can act as a deterrent and stop demands for unnecessary things. UNCITRAL Rules will increase consistency and give the parties more certainty regarding the outcome of the appli-

[233] Ibid
[234] Ibid, P.37
[235] ICSID convention, (n 177), art 47
[236] Larisa Babiy, Adam Czewoja Sheikh, Blerina Xheraj, (n 212), P.45
[237] Ibid, P.46

cation for temporary measures. UNCITRAL rules would provide Ethiopia and potential investors additional assurance.

4.3.1.5 Annulment setting aside of awards

The Convention does not apply to awards made in non-ICSID proceedings, such as awards made in accordance with the Additional Facility Rules or in proceedings handled by the Centre, therefore the national law in effect at the place of arbitration must contain the discipline for setting aside arbitral rulings.[238]

One of the key characteristics that sets ICSID arbitration systems apart from non-ICSID arbitration systems is the annulment regime. An ad hoc Committee of three arbitrators handles appeals of ICSID awards, which are solely governed by the Convention.[239] Instead, the contestation of non-ICSID awards is governed by local arbitration law and resolved by national courts. As a result, the ICSID Convention offers a standard system, whereas the grounds and the responsible authorities differ on a case-by-case basis. Ad hoc Committees' experience is also advantageous because national courts might not be familiar with the particulars of investment disputes and might not be immune to political pressures.[240]

The ICSID Convention's annulment procedure leaves no room for uncertainty on the consequences of the annulled award. The award is no longer valid and no longer binds the member States after the Ad Hoc Committee has revoked it. The ICSID convention's annulment proceedings are a more advantageous system for Ethiopian investment and Ethiopian investors because of their uniformity, expertise, predictability of the discipline, and quickness.

4.3.1.6 Recognition and Enforcement of Arbitral Awards

Recognition has no bearing on the award's ability to be enforced; it is merely a formal affirmation of the award's legal impact.[241] The ICSID Convention allows for the automatic recognition of ICSID awards, and this automatic recognition is typically referred to as the first step toward enforcement because it makes an award a legitimate title that can be used as the foundation for enforcement.[242] The task of domestic authorities at the stage of recognition is thus limited to confirming the authenticity of an ICSID award because an ICSID award is not subject to any condition for recognition that is not provided under the ICSID Convention or to any review by national courts or other authorities.[243] Domestic authorities cannot refuse to recognize the award at their exclusive discretion as long as the parties properly provide the necessary evidence as required by article 54(2) of the Convention.

The New York Convention, on the other hand, offers the interested party the option to oppose enforcement, and the courts in the location of enforcement might refuse to grant it for a number of reasons. Even if one or more conditions exist that may warrant it, the Convention's language

[238] Larisa Babiy, Adam Czewoja Sheikh, Blerina Xheraj, (n 212), P.49
[239] ICSID convention, (n 177), art 52(3)
[240] Larisa Babiy, Adam Czewoja Sheikh, Blerina Xheraj, (n 212), P.59
[241] Li, Fenghua, (n 198), p.164
[242] Ibid
[243] ICSID convention, (n 177), art 54

does not constitute an obligation to reject enforcement, therefore it is a possibility. [244] The ability to reject recognition of the award is the primary distinction between the enforcement regimes for ICSID and non-ICSID awards. It is not possible under the ICSID Convention. The value of ICSID awards is equal to that of final judgments rendered by national courts. As a result, the ICSID Convention produces a system that is more in favor of enforcement than the New York Convention.

The laws governing the execution of judgments in effect in the State whose territories such execution is sought should apply to the execution of the ICSID judgement.[245] Nothing in Article 54 shall be construed as affecting the provisions of the legislation of any Contracting State providing the immunity from execution of such State or of any other State.[246] Therefore, contracting States are not required to execute an ICSID award in situations where a comparable final national court ruling would not be performed. To ICSID and non-ICSID awards, the defense of sovereign immunity from execution is equally applicable.[247]

By ratifying the ICSID Convention, member States renounce their ability to control investment awards and are no longer able to choose whether to grant enforcement. However, a supportive enforcement regime can attract new investors. This is a crucial trade-off that requires serious thought. By ratifying the Convention, Ethiopia gives up the ability to influence how the award is carried out, but it keeps its right to execution immunity.

4.3.2 Substantive aspect

4.3.2 .1 Definition of investment

According to the ICSID Convention, contracting States have the authority to unilaterally tailor the definition of "investment" suitable for protection by a notification under article 25 (4) in exchange for the Convention's expansive jurisdiction over any conceivable asset or activity.[248] Additionally, the lack of attempts to define the idea of investment gives ICSID arbitral tribunals a great deal of discretion.[249] As a result, there are now two different ways to understand the word "investment." The first textual interpretation is based on the specific terms of a BIT between the states.[250] Furthermore, in order to show how dedicated developing countries are to the protection of foreign investment, investment treaties typically include a broad and open-ended definition of "investment" that encompasses virtually any type of asset or activity related to investment. [251]open-list asset-based definitional approach to investment is used in almost all Ethiopia's BITs. In the Yemen-Ethiopia Bilateral Investment Treaty, for instance, Article 1(a) defined investment as "Every kind of asset invested by investors of one Contracting Party in the territory of the Contracting Party, under the laws and regulations of the latter and in particular, but not exclusively

[244] Larisa Babiy, Adam Czewoja Sheikh, Blerina Xheraj, (n 212), P.64
[245] ICSID convention, (n 177), art 54(3)
[246] Ibid
[247] Larisa Babiy, Adam Czewoja Sheikh, Blerina Xheraj, (n 212), P.64
[248] Li, Fenghua, (n 198), p.38
[249] Michael M. Moore, 'International Arbitration between States and Foreign Investors - The World Bank Convention' 18 Stan L Rev P. 1362.
[250] Babiy, Adam Czewoja Sheikh, Blerina Xheraj, (n 212), P.64
[251] Li, Fenghua, (n 198), p.40

includes." Movable and immovable property, shares/stocks/debentures, a claim to money, intellectual property, and corporate concessions are among the things that are typically included on the list of what is meant by investment.[252]

The second teleological approach looks the broader definition of investment and contends that it should not be restricted to a single definition, as the term investment is ultimately dependent on a party's recognition and assent to the action or as-set in question.[253] The scope of investment is therefore broad, and tribunals operating under this framework typically base their judgments on the definition of the investment provided in the consent document. They also determine whether the consent incorporates the relevant asset or enterprise and whether it establishes ICSID jurisdiction.[254]

When choosing an arbitration venue, the difficulty of predicting a result from different investment regimes when interpreting the ICSID Convention can be a strong deterrent. In situations where the definition of investment is ambiguous, UNCITRAL arbitration may prove to be more alluring for Ethiopia.

4.4. Benefits of ICSID from Political and Economic perspectives

4.4.1 Development of Political and foreign relations

The Executive Directors' motivation for presenting the ICSID Convention to governments is to foster greater international cooperation for economic development. The establishment of an institution to expedite the resolution of disputes between States and foreign investors is a crucial step toward fostering a climate of confidence and, as a result, generating a larger flow of private international capital into those governments that seek to attract it.[255]

While Ethiopia has been increasingly active in the formation of investment agreements, the existing limitation is that the preferred method of settling investment disputes, being ICSID Convention arbitration, is not ratified by Ethiopia. Arguably, this reservation undermines the perceived commitment of Ethiopia to the terms of the treaties and international agreements because the protection Ethiopia has become more involved in the creation of investment treaties, the existing limitation is that Ethiopia has not ratified the ICSID Convention, which is the preferred means of resolving investment disputes.

The way that foreign people and businesses are treated has an impact on the interstate connection. By using ICSID to safeguard individuals of other countries, governments can show that they are capable of upholding a consistent rule of law and participating in the global economy.[256]

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[252] Treaty between the Federal Republic of Germany and the Federal Democratic Republic of Ethiopia concerning the Encouragement and Reciprocal Protection of Investments (Signed 21 April 1964) art 1(1)

[253] Julian Davis Mortenson, 'The Meaning of "Investment": ICSID's Travaux and the Domain of International Investment Law' (2010) 51.1, Harvard International Law Journal P. 269.

[254] Ibid

[255] World Bank, Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and National of other States, (hereinafter Report of Executive Directors) para 9

[256] Ibid

The foundation for bettering international relations is ongoing compliance and economic integration. These relationships are based on trust and the rule of law, and in order to maintain that trust, it is vital to show resistance to the arbitrary handling of foreign investment.[257] In doing so, governments can show that they value one another and lay the groundwork for future agreements that will enable them to participate actively in the global community. These connections will be crucial to a nation's sustained growth and its status/place in international trade and investment in an increasingly globalized community.[258]

Ratifying an international convention sends a signal that domestic institutions are reliable. This changes traders' perceptions about the reliability of a country, which in turn influences their trading behavior.[259] The channel through which international institutions affect trade flows, however, is indirect. Ratifying an international legal instrument signal, a country's willingness to play by the rules set forth therein. This influences the perception of firms from that country as reliable trading partners.[260]

The ICSID is properly tailored to allow large flexibility in the implementation of economic policies involving the private sector and ensure FDI protection by establishing a mechanism for enforcement aimed at discouraging opportunistic governmental behavior. [261] Hence, ratification of the ICSID Convention would enhance Ethiopia's image abroad as an investment-friendly Country. It would boost foreign investors' confidence, that arbitral awards in the Country would be assured recognition and enforcement, and thus the risk (and cost) of their investment would be reduced.[262]

4.4.2 Attractiveness of the investment climate

The facilitation of investment flows to Third World states is one of the main justifications that advocates for the creation of ICSID cite as the "primary goal" of the ICSID Convention.[263] Ibrahim Shihata, the organization's former secretary-general, explained the motivation behind the creation of ICSID by saying, "ICSID should not be considered just as a vehicle of dispute resolution. It ought to be viewed as a successful tool of international public policy that, in the end, aims to provide a steady stream of resources for developing nations under fair terms.[264]

[257] Ibid, P.5
[258] Ibid
[259] Daniel Berkowitz, Johannes Moenius and Katharina Pistor ,'Legal Institutions and International Trade Flows' (2004) 26 Michigan Journal of International Law P. 194
[260] Ibid, P.197
[261] Akhil Raina, Matisse Barbaro, Saweria Mwangi, 'Should Country X Become a Member of the ICSID?'https://www.tradelab.org/single-post/2018/04/04/should-country-x-become-a-member-of-the-icsid> accessed 20 August 2022 P.17
[262] Ibid
[263] Ibironke T. Odumosu (n 176), P.358
[264] Ibid

The Convention's main objective, according to the Report of Executive Directors of ICSID, is to encourage a greater flow of private international investment, and its rules carefully balance the interests of investors and host nations.[265]

ICSID essentially contends that private capital comes from a belief in neoliberal economic theory and that economic prosperity results from protecting foreign investors. Economic liberalism is predicated on the idea that foreign investment benefits host countries; hence, it follows that such investment should be protected through investment protection procedures, such as international dispute settlement.[266]

It is acknowledged that the ICSID undertakes some duties to foster, among other things, the coherent development of international investment, intellectual leadership on international law related to transnational investment and arbitration. This is because one of the ICSID's goals is to encourage increased flows of transnational investment (both ICSID and non-ICSID arbitration). Comparatively, the primary objective of UN-CITRAL, a body of focused on commercial law, is to modernize and harmonize international trade law. [267] In a similar manner, the International Chamber of Commerce (ICC) unites all international business sectors and works to promote the growth of an open global economy. The ICSID's unique position determines its distinctive role in the investor-State dispute settlement mechanism, and the unique role of the ICSID will rise to prominence not only based on its strengths as reflecting the needs and wants of contracting States and investors, but also in the context of the investor-State dispute settlement mechanism as a whole. Given that the majority, if not all, non-ICSID institutions do not focus on the law of foreign investment (though some of their works are related to investment arbitration).[268] Ethiopia ought to ratify ICSID rather than other arbitration forums.

The inclusion of an ICSID arbitration clause in treaties, agreements, and domestic legislation has a signaling effect on investment flows, even though it is difficult to quantify the contribution of ICSID to investment flows. Investors may perceive this as evidence of a favorable investment environment.[269]

Nevertheless, the influence of the dispute settlement mechanism in attracting FDI is a contested issue. Some commentators believe that dispute settlement mechanisms, such as arbitration, attract FDI, but others insist that isolating investment arbitration from other substantive treaty rights may be impracticable. There is limited empirical evidence in favor of either position of the debate.[270] But, it is unlikely that a foreign investor will engage in FDI in the host State without concrete assurances for the protection of foreign investment. One way this has been done is

[265] Report of Executive Directors, (n 255) para 13
[266] Ibironke T. Odumosu (n 176), P.359
[267] Li, Fenghua, (n 198), p.76
[268] Ibid
[269] Ibironke T. Odumosu (176), P.364
[270] Felix O. Okpe, 'Endangered Element of ICSID Arbitral Practice: Investment Treaty Arbitration, Foreign Direct Investment, and the Promise of Economic Development in Host States '(2014) 13 Richmond Journal of Global Law & Business P.245.

through the consent to investment treaty arbitration, a means by which the foreign investor can enforce his substantive and procedural rights against the host State.[271]

4.5 Criticisms and withdrawals from the ICSID System

4.5.1 withdrawals from the ICSID System

Along with the strong supporters of ICSID and the investor-state System of protection, there is also a growing number of detractors and critics. While some of the critiques seem to have more scientific grounds, others appear to contain an ideological component.[272]

In the past several years, the ICSID has come under fire, particularly from suspicious Latin American regimes. Bolivia,' Ecuador, and Venezuela' have all withdrawn from the ICSID Convention , the controlling treaty that established the ICSID, In January 2013 Argentina also announced its intent to join the defectors.[273]

This debate is noticeably exemplified in the contrasting doctrines (Ideologies) of Carlos Calvo and Cordell Hull. [274]The Calvo Doctrine, a theory put forward by an Argentine at the end of the nineteenth century, emphasizes the equal treatment of domestic and foreign investors in the courts of the host nation. According to Calvo, disputes over investments by foreign investors should be resolved in the host nation's courts because foreign investments deserve no heightened protection.[275] This doctrine persists today in many still-developing nations as the ideal approach to international investment disputes and is reemerging after a period of FDI-friendliness.[276]

The Hull Doctrine, on the other hand, is an approach to FDI put forward by President Franklin D. Roosevelt's Secretary of State, Cordell Hull.[277] The Hull Doctrine calls for "prompt, adequate, and effective payment" for expropriated investments." This means that compensation for expropriated investments should take the form of real currency, be offered in a reasonable period, and represent the fair market value of the investments. Prompt, adequate, and effective compensation for seized items is an international standard that often affords more protection to international investors than domestic investors, who might be deprived of their investment without any compensation at all.[278] Thus, from the perspective of capital-exporting states, something greater than equal treatment was desirable for international investment.

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[271] Ibid
[272] Ignacio A. Vincentelli, 'The Uncertain Future of ICSID in Latin America' (2010) 16 LAW & BUS. REV. AM. P.421
[273] McElhiney, William B. III,' Responding to the Threat of Withdrawal: On the Importance of Emphasizing the Interests of States, Investors, and the Transnational Investment System in Bringing Resolution to Questions Surrounding the Future of Investments with States Denouncing the ICSID Convention' (2014) 49 Texas International Law Journal P.602
[274] Ibid, P.605
[275] Ibid
[276] Ibid
[277] Ibid
[278] Ibid

Political and economic reforms have been made in Bolivia, Ecuador, and Venezuela that have increased the government's influence over the economy. [279]These measures have had the unintended consequence of nationalizing a number of strategically significant industries and lowering foreign investment. A number of claims with a potential value in the billions of millions have been registered with ICSID in response to State action and expropriation, notably questioning the amount governments were and are ready to pay in compensation for their nationalization plans. These three states withdrew from the ICSID convention in order to convey a clear political message and to reduce their potential liabilities and arbitration claims.[280]

The arguments against the ICSID and the investor-state system of protection that Latin American governments advanced are focused on the following reasons: ICSID awards are not subject to appeal; the fact that a vast majority of ICSID awards have been decided in favor of the private investors shows that the system lacks neutrality and impartiality; only private companies may sue at this forum, and the cost to litigate these claims is very high.[281] Among other motivations, Bolivia's and Ecuador's declarations and actions against ICSID and BITs are driven by an ideology that foreign direct investment is wrong, promotes imperialism, and does not deserve protection. It is hard to argue in favor of ICSID on logical grounds if detractors disapprove of it on ideological grounds.[282] Notwithstanding the fact that these complaints have political overtones and serve policy goals, they are not entirely without validity and have sparked extensive discussion and research on the drawbacks of investment arbitration for States. Those critiques can, however, be applied to the entire system of international investment arbitration and are not specific to the ICSID arbitration mechanism.[283]

Although Argentina and Nicaragua have also expressed their displeasure with ICSID, they have taken steps to restrict the direct applicability of ICSID rulings and the scope of investment arbitration rather than denouncing the conventions. These two nations have taken steps to limit the direct applicability of ICSID awards, such as constitutional changes or legislative modifications.[284]

The World Bank received written notice of the Republic of Bolivia's withdrawal from the ICSID Convention on May 2, 2007, making Bolivia the first state to do so. According to ICSID Convention Article 71, the denunciation becomes effective six months after Bolivia's notice was received on November 3, 2007.[285] The choice was made to uphold nations' sovereign right to control foreign investment in their native boundaries, as Bolivian President Evo Morales presided. Bolivia began passing laws on hydrocarbons in 2005, which resulted in the nationalization of the hydrocarbons sector (natural gas and oil fields). President Morales has taken control of the min-

[279] Larisa Babiy, Adam Czewoja Sheikh, Blerina Xheraj, (n 212), P.89
[280] Ibid
[281] McElhiney, (n 273), P.422-423
[282] Wick, Diana Marie, (n 197), p.247
[283]Larisa Babiy, Adam Czewoja Sheikh, Blerina Xheraj, (n 212), P.90
[284] Ibid
[285] ICSID News Release<http://icsidfiles.worldbank.org/icsid/icsid/staticfiles/Announcement3.html >accessed 10 June 2022

ing, telecoms, and oil and gas industries since taking office in 2006.[286] Economic reforms including the nationalization of the hydrocarbon industry by the Bolivian government and other important sectors gave rise to numerous major investment conflicts are another Consideration for ICSID Denunciations by Bolivia.[287] Bolivia challenged ICSID for its complexity, obscurity, lack of neutrality, high expense, and lack of appeal rights for the award. Bolivia also highlighted Articles 24 and 135 of the Bolivian Constitution, which call for a withdrawal by Bolivia.[288]

The World Bank's arbitration facility was denounced as an atrocity by Ecuador's President Rafael Correa, who said on May 30 that his nation will be denouncing the International Centre for Settlement of Investment Disputes (ICSID). He also stated that his government was working on a regional substitute involving the South American Union (UNASUR According to the president, Correa, leaving ICSID is essential for "the liberation of our countries because this [ICSID] signifies colonialism, slavery concerning international corporations, Washington, or the World Bank We cannot tolerate for it."[289] The World Bank system's and the ICSID tribunals' bias, as well as a violation of sovereignty, are cited as the reasons for Ecuador's exit from ICSID.[290] "In accordance with Article 71 of the ICSID, the denunciation takes effect six months after the receipt of Ecuador's notice, i.e., on January 7, 2010," the ICSID declared in response to Ecuador's formal notice of denunciation.[291]

On June 21, 2021, more than ten years later, Ecuador's current president changed the country's policy and re-joined the ICSID convention.292

The Bolivarian Republic of Venezuela, joining Bolivia and Ecuador as the third nation to do so, denounced the ICSID Convention in January 2012.[293] A wave of domestic and foreign-owned assets in the banking, construction, tourism, telecommunications, steel, petroleum, and other industries have been nationalized by Chávez's government. These claw-back rules have led to the majority of claims made by foreign investors against the government; the principal point of dispute is typically whether the amount of compensation provided by the government is adequate.[294] The Venezuelan government claims that it "acted to preserve the right of the Venezuelan people to freely choose their strategic economic and social orientations," citing the fact that 232 of the 234 cases that were submitted before ICSID "favored transnational interests".[295]

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[286] Wick, (n 197), P.245
[287] Larisa Babiy, Adam Czewoja Sheikh, Blerina Xheraj, (n 212), P.94
[288] Katia Fach Gomez, 'Latin America and ICSID: David Versus Goliath? (2011) 17 Law & Bus. Rev. Am P.210
[289] Ignacio ,(272), P.422
[290] Larisa Babiy, Adam Czewoja Sheikh, Blerina Xheraj, (n 212), P.94
[291] Fernando Carbrera Diaz, "Ecuador continues exit from ICSID." (8 June 2009) <https://www.iisd.org/itn/en/2009/08/28/ecuador-prepares-for-life-after-icsid-while-debate-continues-over-effect-of-its-exit-from-the-centre/> accessed 21 June 2022
[292] Gustavo Prieto; Ecuador returns to the ICSID Convention: A brief assessment of its decade-long international investment law 'exit strategy'< https://www.ejiltalk.org/ecuador-returns-to-the-icsid-convention-a-brief-assessment-of-its-decade-long-international-investment-law-exit-strategy/> accessed 21 August 2022
[293]Sergey Ripinsky, "Venezuela's Withdrawal From ICSID: What it Does and Does Not Achieve." (April 13 2012) Issue 3. Volume 2 Investment Treaty News< https://www.iisd.org/itn/en/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve/ >accessed 21 June 2022
[294] Ibid
[295] Larisa Babiy, Adam Czewoja Sheikh, Blerina Xheraj, (n 212), P. 95

Political and economic changes have been carried out in Bolivia, Ecuador, and Venezuela, nationalizing strategically significant industries and lowering foreign ownership. These three nations criticized the ICSID Convention in an effort to reduce the number of claims that were filed with ICSID, which were mostly about violations of State expropriation.[296]

4.6 Criticisms of the ICSID System

4.6.1 Exclusion of National courts and Erosion of state sovereignty

States withdraw from ICSID because detractors allege shortcomings in the system, but, to the extent that certain shortcomings exist, they exist across the board. Encroachment on state sovereignty is an aspect of investor-state arbitration that applies equally to all types of investor-state arbitration, not just ICSID.[297]

According to the ICSID Convention, unless otherwise specified, an investment claim brought under the provisions of the Convention shall be regarded to have granted permission to such arbitration in lieu of any other remedies.[298] As a result, it is clear that investment disputes cannot be decided by national courts but only through ICSID arbitration. Yet before agreeing to arbitrate under the Convention, a Contracting State may demand the use of all available domestic administrative or judicial remedies.[299]

But, in most Ethiopia BITs there is no indication that the investor should exhaust local remedies before resorting to an international arbitration tribunal, and before resorting to ICSID jurisdiction, parties to the dispute are not necessarily under obligation to try amicable means. Although it is typically stated in the BITS of Ethiopia that investors should attempt to resolve disputes peacefully before resorting to international arbitration, including negotiation, conciliation, and arbitration in most cases, the investors are not obliged to do so.

Furthermore, ICSID has also rules which require the automatic recognition and direct enforceability of ICSID awards those rules excludes domestic courts from overseeing the recognition and enforcement of an award.[300] Each Contracting State shall regard as binding and enforce the pecuniary obligations imposed by an award made under the Convention within its borders as if it were a final judgment of a court in that State, under the ICSID system.[301] Thus 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 further domestic court scrutiny or recognition.[302]

Investor-state arbitration encroaches on state sovereignty in that it limits a state's ability to regulate. States exercise sovereignty by entering into investment treaties, but also relinquish some sovereignty by agreeing to investor-state arbitration as a dispute settlement mechanism. It is "be-

[296] Ibid, P. 96
[297] Wick, (n 197), P. 269
[298] ICSID convention, (n 177), art 26
[299] Ibid
[300] Haile Andargie ,ّAnalysis of ICSID Arbitration from the Perceptive of Developing Countries: A Bittersweet Choice' (2019) 10 Bahir Dar University Journal of Law P.14
[301] ICSID convention, (n 177), art 54(1)
[302] Ibid ,art 54 (2)

yond dispute" that the current investment regime diminishes sovereign authority "in matters over which national law otherwise grants complete dominion." But this criticism should not be directed towards ICSID, however, as interference with state sovereignty arises from a BIT or other investment treaty, not from arbitration forums.[303]

It's interesting to note that States must generally transfer greater sovereign rights in ICSID arbitration due to four issues, and States transfer a different amount of sovereignty to non-ICSID arbitration.[304] First, by agreeing to the jurisdiction of ICSID arbitration, contesting parties would be prevented from seeking relief from national courts throughout the arbitral process. Second, the location of the ICSID arbitration processes has no bearing on the validity of the awards. Third, awards cannot be reviewed by national courts tasked with enforcing ICSID arbitral judgements for procedural flaws or substantive validity. [305] The self-contained feature of ICSID arbitration, which renders it a system completely free from the oversight power of national courts, seems to be less effective in imposing and enforcing interim relief but more crucial in guaranteeing the integrity of arbitral procedures.[306]

The fear that joining the ICSID will make it harder for a country to control important aspects of its economy. However, such a concern is overdone conceptually. This is due to the following reasons: first, the ICSID Convention does not impose any substantive obligations on the Member States (i.e., it is entirely procedural and depends on the parties' agreement); second, Ethiopia may exclude a class (type) of dispute from the ICSID's jurisdiction upon ratification or even later; third, ICSID proceedings are not always automatic, as Ethiopia may require the exhaustion of all available local remedies (national courts, etc.) before the start of arbitration; and fourth.

4.6.2 Perceived bias in favor of investors

ICSID has also been criticized as being biased in favor of multi-national corporations. Since ICSID is affiliated with the World Bank, some developing countries perceive ICSID as biased in favor of investors.[307]

ICSID was intended to be an agency independent of the World Bank, but there is considerable overlap in the administration of the two institutions. ICSID is maintained by and subsidized by the World Bank to cover the Centre's fixed costs. Due to the connection between the World Bank and ICSID, there is a strong belief that non-compliance with an ICSID award by a member state may result in that state being unable to obtain loans and credits from the Bank.[308]

Some commentators suggest investors are primarily successful and that "host States cannot be winners in investment arbitration.'" Similarly, there are claims that "Poorer Nations Pay Dearly for Investment Deals " and "Investors' Odds of Winning are High.[309] Even Evo Morales, Presi-

[303] Wick, (n 197), P. 269
[304] Li, Fenghua, (n 198), p.13
[305] Ibid
[306] Li, Fenghua, (n 198), p.64
[307] Wick, (n 197), P. 270
[308] Ibid, P. 265
[309] Franck, Susan, 'Empirically Evaluating Claims about Investment Treaty Arbitration' (2007) 86 North Carolina Law Review P.48

dent of Bolivia, said, in connection with Bolivia's withdrawal from the World Bank and ICSID: " 'Governments from Latin America and I think all over the world never win the cases. The transnationals always win.'[310] The implication is that under the current process of resolving disputes, the deck is stacked against host governments. And that state of affairs is contrary to democratic values and undermines the credibility of arbitration and investment treaties.[311]

There is often 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.[312]

A smaller portion of high-income countries was subjected to claims, but they were still a meaningful component of the population. Meanwhile, the lion's share of the claims tended to be against "upper middle income" countries. The small number of cases against LDCs and "low-income" countries suggested that the dispute resolution risk for the most vulnerable developing countries may not be overwhelming. [313] Susan Franck's empirical analysis shows that reasonably equivalent investor and state win rates were relatively promising.[314]

Though many states continue to reinforce a negative outlook. They think that foreign investors are favored by international arbitration. Years of experience have demonstrated that even developing nations may successfully employ the approach. Numerous African and Caribbean nations, including Jamaica, as well as countries like Madagascar, Guinea, Gabon, Congo, Senegal, and others, have defended themselves in the center. They now have enough experience to manage investment disputes in an international courtroom.[315]

Studies have also shown that respondent states do not fare worse in ICSID than in other arbitration forums and that investors do not always win. Since investors do not fare better in ICSID arbitration than in other types of investor-state arbitration, the criticism of bias applies equally to all investor-state arbitration, not just to ICSID arbitration.[316]

4.6.3 Lack of the appeal system

ICSID has also been criticized by some for its lack of an appeal mechanism. Carlos Garcia, who has represented the government of Mexico in investor-state arbitration, identifies "some inherent procedural and systemic flaws" with how investor-state disputes are adjudicated under arbitration. Since "any adjudicative panel can err," an opportunity for review is desirable, and Garcia identifies this "lack of any effective and consistent review or appeal mechanism" as a "glaring"

[310] Ibid
[311] Ibid
[312] Andargie, (n 300), p.11
[313] Susan, (n 309) P.84
[314] Ibid
[315]Hailu Burayu, Settlement of investment disputes and the ICSID convention: An Ethiopian Experience, Lecturer SMUC http://repository.smuc.edu.et/bitstream/123456789/2357/1/Proceedings%20of%20the%201st%20Multi-disciplinary%20seminar.86-95.pdf accessed 22 August 2022
[316]Wick, (n 197), P. 270

defect of investor-state arbitration. The lack of a review mechanism "adds to the general uncertainty in deciphering the scope of the treaty rights."[317]

According to Article 53 (1) of the ICSID Convention, each party must abide by and comply with the conditions of the award and that enforcement. The award must be binding upon the parties to the conflict and shall not be subjected to any appeal or other recourse than those provided for under the Convention. [318] However, the ICSID Convention provides a mechanism for review through which a party may request that the award be annulled. According to Article 52 of the ICSID Convention, a party may only ask for the award to be annulled under the following circumstances: (a) the Tribunal was improperly constituted; (b) the Tribunal manifestly exceeded its authority; (c) a Tribunal member committed fraud; (d) a serious departure from a fundamental rule or procedure; or (e) the award failed to provide the reasons for the decision.[319] However, annulment proceedings review only the legitimacy of the decision's process. Unlike an appeal, an annulment does not review the substantive validity of the award rendered. Therefore, there is currently no cure for an award decided on a substantively invalid basis.[320] The current annulment process under ICSID is not able to reconcile any legal errors made in the resolution process.[321]

National courts at the arbitral site, where different jurisdictions have different rules for setting aside verdicts, will take non-ICSID arbitral awards into consideration. This contrasts with the self-contained and centralized system that gives ad hoc committees the authority to annul ICSID arbitral awards based on a relatively small number of specific grounds. Such a largely decentralized framework unquestionably points to varied standards of review in non-ICSID arbitration; more significantly, the mismatch between the various standards of the review found in national statutes suggests a notable degree of confusion at first glance.[322]

Comparatively speaking, despite the fact that a substantial number of jurisdictions adopt the restricted and exclusive grounds of recourse outlined in the UNCITRAL Model Law, many other jurisdictions allow for the annulment of international arbitral awards on grounds that are broader than those specified in the UNCITRAL Model Law, in which case judicial review on the merits of arbitral awards may be appropriate. In two instances, where the involvement of national courts includes a limited right of appeal, the merits are reviewed. In the first situation, a legal error may constitute cause to set aside an arbitration award.[323] The existence of a factual error is the second situation in which arbitral awards would be subject to appellate review.[324]

The analysis of these divergences, however, has shown that both the ICSID annulment and non-ICSID setting aside fulfill an ultimately equivalent function through two instruments with different natures, and the diverse natures do not inevitably result in distinct outcomes. This is because the ratio of ICSID awards being annulled or of non-ICSID awards being set aside bears less significant distinctions, despite the This

[317] Ibid, P.270
[318] ICSID Convention, (n 177), art 53
[319] Ibid, art 52(1)
[320] Elizabeth Maul,' The International Centre for the Settlement of Investment Disputes and the Developing World: Creating a Mutual Confidence in the International Investment Regime' (2015) 55 Santa Clara Law Review P.910
[321] Ibid, P. 915
[322] Ibid
[323] Li, Fenghua, (n 198), p.129
[324] Ibid, p.142

is because, despite the varying degrees of uncertainty and consistency in ICSID and non-ICSID challenging proceedings and the varying standards of review applied by ad hoc committees or national courts in ICSID and non-ICSID arbitration, the ratio of ICSID awards being annulled or of non-ICSID awards being set aside carries less significant distinctions.[325]Therefore, the Ratification of ICSID or NON-ICSID arbitration does not create any difference for Ethiopia.

4.6.4 Complexity and high cost of arbitration

The high cost of investor-state arbitration is one criticism that has been aimed at ICSID. Investment claims are notoriously drawn out and expensive, and investor-state arbitration is criticized as neither speedy nor cost-effective.[326] A functional challenge to ICSID arbitration is the sheer cost and complexity of ICSID proceedings. Along with these difficulties, it has been noted that low-income countries lack the financial means to pay the legal bills and other expenses of defending themselves against well-resourced multinational corporations. Moreover, what developing countries require is the capacity to identify, explore, and verify complex socio-economic data to defend against the claims of investors from wealthy states.[327]

Costs matter in part because they can give rise to significant difficulties at the end of a case and are a risk factor to take into consideration before using investor-state arbitration. This is particularly true for low-income countries, and for small companies, which cannot afford to be represented by the most experienced and sophisticated law firms in the field, as claimants usually are.[328] Others express concerns that "substantial costs make contestation of an arbitral claim an unattractive option for poorer developing countries.[329]

The cost of legal services, fees to the institution, which cover institutional expenses including buildings, the cost of witnesses, travel costs, arbitrator fees, and the accumulation of interest on a disputed award are some of the variables that contribute to costs in ICSID arbitration.[330] In addition to the cost of legal counsel, the cost of arbitration includes arbitrators' fees and administrative expenses. The administrative costs of ICSID arbitration are lower than the charges of other arbitral institutions because the "administration expenditures are covered almost entirely by the World Bank.[331]

The average cost of ICSID arbitration is 4 million US dollars, and in some cases even exceeds 40 million US dollars. Yet, the relative length of ICSID arbitration can significantly raise costs.[332] 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 uncer-

[325] Ibid
[326] Wick, (n 197), P.283
[327] Leon E. Trakman, 'The ICSID Under Siege' (2012) 45 Cornell International Law Journal P.616
[328] Susan, (n 309), P.66
[329] Ibid
[330]Larisa Babiy, Adam Czewoja Sheikh, Blerina Xheraj, (n 212), P. 68
[331] Wick, (n 197) P.284
[332] Larisa Babiy, Adam Czewoja Sheikh, Blerina Xheraj, (n 212), P. 68

tainties. So, the high costs and uncertainties in cost allocation make ICSID a weapon whereby foreign investors threaten developing countries given their limited resources at their disposal. [333]

Generally, "Investor-state arbitration is criticized as "neither swift nor cost-effective" and investment claims are infamously protracted and expensive. Because ICSID expenses are managed, as opposed to ad hoc arbitration fees, they are less expensive than other investor-state arbitration.[334]

The administrative costs of ICSID arbitration are lower than the fees of other arbitral institutions when compared to non-ICSID arbitration venues since "Almost all administrative costs are covered by the World Bank the World Bank employs the ICSID personnel, ICSID offices are situated in the World Bank headquarters in Washington, D.C., and "All of the common services offered by the World Bank are shared by ICSID. In light of this, the parties to an ICSID arbitration "ICSID's fees for administering an arbitration are just the reimbursement of out-of-pocket costs; do not contribute to their upkeep.[335]

An empirical analysis revealed that, largely as a result of the ICSID's limits on arbitrator fees, the average tribunal costs in an ICSID arbitration case were 10% cheaper than in a UNCITRAL case. Although the cost of investment dispute arbitration should not be used as justification to reject the ICSID Convention, ICSID arbitration is more economical than non-ICSID arbitration.[336] In conclusion, the ICSID often includes less financial hardship if Ethiopia ratified the convention as opposed to other options.

4.6.5 Lack of Transparency

One of the attractive aspects of arbitration, in comparison to judicial proceedings, is its confidentiality, which enables business enterprises to settle their disputes privately.[337] At least three considerations favor the retention of ICSID's rules on confidentiality. First, ICSID arbitration is a procedure inter partes; that is, the arbitration agreement constitutes a private contract between the parties. Accordingly, the private nature of their arrangement must be respected."' Second, the rules protect the confidentiality of business information and technological secrets.' Third, confidentiality is desirable because it often prevents third parties from learning of the very existence of the dispute, the context of many modern transnational investment agreements.[338]

The International Centre for Settlement of Investment Disputes' (ICSID's) Rules of Procedure for Arbitration Proceedings safeguard the confidentiality of arbitral procedures. The tribunal may permit the parties to "attend or observe all or part of the sessions," according to Article 32(2) of the arbitration rule. The absence of objections from the party and consultation with the Secretary-General are the sole requirements that must be met. Third parties are permitted to submit documents to the Tribunal under ICSID Arbitration Rule 37(2) if the Tribunal so permits. Prior consultation with the parties to the disagreement, albeit without their approval, and the subject

[333] Andargie, (n 300), p.15
[334] Wick, (n 197) P.271
[335] Ibid, p.284
[336] Wick, (n 197) P.285
[337] Benjamin H. Tahyar, 'Confidentiality in ICSID Arbitration after AMCO Asia Corp. v. Indonesia: Watchword or White Elephant' (1986) 10 Fordham International Law Journal P.93
[338]Ibid, P.113

matter coming within the purview of the dispute were the two conditions that had to be met. These contributions are intended to support the Tribunal and draw its attention to a different viewpoint. The third party must also have a significant stake in the outcome of the proceedings. The parties must agree in order for the award to be published, as per ICISD Arbitration Rule 48(4).

The decisions of investor-state disputes could have significant impacts on broad public welfare issues, it is not appropriate for such cases to be resolved in privatized arbitration[339] One consequence of private hearings and ad hoc awards is that there is limited public understanding of the processes through which arbitration institutions like the ICSID function.[340] Ad hoc arbitration methods, deliberations, and decisions are unlikely to result in consistent investment jurisprudence, which is a related consequence. It also follows that absent full access to the records of investment arbitration case documentation and testimony, it is sometimes difficult to conclude the issues, how they are presented, and how arbitrators construe them.[341] While the 2006 amendments to the ICSID Convention Rules improved transparency by permitting third parties to attend hearings and publication of the award, both of the new rules are dependent upon the consent of the parties.[342]

With the view to address this problem and public concerns, various BITs provided transparency clauses. For instance, under the Indian Model BIT, it is indicated that the respondent, which is usually the host state, should make public available regarding the notice of arbitration, any pleading concerning jurisdiction and merit-based submission, transcripts of the hearing and any decision, order, and award of the arbitrators.[343] By the same token, the ASEAN investment framework provided that the disputant parties should 'publicly available all awards and decisions produced by the tribunal.' Likewise, the USA Model BIT provides that on top of the notice of intent and pleadings, the submission of the non-disputant party and amicus curiae should be available to the public. Furthermore, under the same Model BIT, it is indicated that the hearing of the Tribunal should be open to the public.[344]

It is acknowledged that the SCC, ICC, LCIA, and other mainstream arbitration have primarily been designed to apply to international commercial disputes between private business owners and that the UNCITRAL Rules were initially developed for use in ad hoc international commercial arbitration, which typically deals with international trade disputes. Many developing countries believe that ICC or other non-ICSID arbitration gives undue weight to the preferences and interests of capital-importing countries, which is the effect of non-ICSID arbitration's private characteristic, which seems to be more perceptible in cases of non-ICSID institutional arbitration.[345]

[339] Elizabeth, (n 320), P.913
[340] Leon, (n 327), P.621
[341] Ibid
[342] Elizabeth, (n 320), P.914
[343] Yehualashet Tamiru,' A Critical Examination of the Symmetry of Ethiopia's Bilateral Investment Treaties' (Masters of Laws Thesis, University of Pretoria 2019)
[344] Ibid
[345] Li, Fenghua, (n 198), p.6

In the interest of public policy, "there should be a maximum transparency, particularly in international arbitration proceedings involving a state or state entity and a foreign legal or natural person." There is "no real defensible argument" to keep investor-state cases "in the dark" because they "often have serious public policy implications.[346] Overall, transparency is desirable. ICSID arbitration is much more transparent than non-ICSID arbitration, the existence of which may not even be known by the public. Therefore, ICSID is preferable to non-ICSID investor-state arbitration.[347]

Under Ethiopia's BITs, there is no indication that the proceeding, order, and award of the Tribunal should be publicly available. The BITs of Ethiopia seem to ignore the fact that access to information, has a tremendous impact on the country at large and it will be difficult to challenge based on the legal rights emanated from the BITs.

The United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (the Mauritius Convention on Transparency), which went into effect in October 2017 is not signed by Ethiopia.[348] This Convention applies to any investor-State arbitration, whether or not initiated under the UNCITRAL Arbitration Rules, in which either the respondent country or the claimant's home country is a party that has not made a relevant reservation.[349] The Convention allows for, inter alia: the publication of documents such as written submissions; filing of third-party submissions; and open hearings. However, since Ethiopia is not a signatory to the Mauritius Convention on Transparency, the Convention would not apply to disputes in which Ethiopia would be involved. This shows that the country gives less emphasis to transparency and ratification of ICSID is not bad after all.

Regardless of ad hoc or institutional arbitration, investor-State non-ICSID arbitration typically inherits from international commercial arbitration the quality of confidentiality, which is traditionally acknowledged as one of the key benefits of arbitration, especially given that the same arbitration rules apply to the adjudication of both commercial and investment arbitration.[350] ICC has intended to ensure transparency in dispute resolution processes, especially those involving States and state entities. Nevertheless, third parties' submission and publication of documents are absent in the ICC Arbitration Rules (2012).[351] The PCA Arbitration Rules (2012) also provide some transparency, including open hearings agreed upon by the parties to a dispute and publication of awards with the consent of everyone involved or where disclosure is required of one party by a legal obligation to safeguard legal rights or pertinent judicial proceedings.[352]

4.7. Conclusion

Existing investment agreements with Ethiopia refer ICSID as a mechanism for resolving disputes. The country's reservation diminishes the perception of Ethiopia's commitment to the terms

[346] Wick, (n 197) P.283
[347] Ibid
[348] TheUnitedNationsTreatyCollection,2017<https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XXII-3&chapter=22&lang=en> accessed 26 August, 2022
[349] Ibid
[350] Li, Fenghua, (n 198), p.200
[351] Ibid
[352] Ibid

of the treaties and international agreements because the protection provided by the ICSID Convention, conceptually, represents and symbolises the respect between the agreed states on investment promotion and development. Therefore, joining ICSID will send a strong, investor-friendly message to the international society as well as to foreign investors.

The ICSID is unique among the other ISDS fora due to its specialty in ISDS, especially in light of its enforcement powers. Offering a venue that is sensitive to state needs as opposed to other fora, which were mainly intended for commercial arbitration, promotes or is believed to cultivate, investors' confidence. The bottom line is that Ethiopia would be better off ratifying the ICSID Convention than not, to put it properly.

Ethiopia will still be able to control crucial areas of its economy even after it joins the ICSID. This is due to the following reasons: first, the ICSID Convention does not impose any substantive obligations on the Member States (i.e., it is entirely procedural and depends on the parties' agreement); second, upon ratification or even later, Ethiopia can exclude a class (type) of dispute from the ICSID's jurisdiction; third, ICSID proceedings are not always automatic because Ethiopia may demand that local remedies (national courts, etc.) be exhausted before ICSID arbitration can started.

By ratifying the Convention, Ethiopia will also have the chance to participate in the governance of the Centre and the process of amending the Convention and its provisions.

The self-contained nature of ICSID arbitration, which makes it a system wholly shut off from the oversight of national courts, appears to be effective at protecting the integrity of arbitral procedures. Given that the grounds for annulment are specified in the Treaty and therefore predictable and independent of domestic courts and laws of other jurisdictions, the ICSID Convention would be preferable for Ethiopia in terms of annulment.

Among alternative methods for resolving investment disputes, ICSID is the one that is both the most affordable and transparent. In conclusion, Ethiopia would be in a better position if it ratified the ICSID Convention.

CHAPTER FIVE

CONCLUSION AND RECCOMENDATIONS

5.1. Conclusion

Ethiopia is one of the signatory states to the ICSID convention, but it has not yet ratified the convention. However, ICSID mechanisms will have an impact on Ethiopia since many of its BITs recognized submission to the jurisdiction of ICSID and its additional facilities. Thus, the core issues addressed in this research are the pros and cons of ratification of the ICSID convention for Ethiopia and the consequences of referring to the ICSID jurisdiction, without ratifying the Convention itself. The thesis assesses chiefly the arguments forwarded against and in favor of ICSID by developing countries, Criticisms, and withdrawals from the ICSID System and forwards a conclusion on the cost and benefit analysis. The thesis also analyzes the preconditions of bilateral investment treaties that Ethiopia signed or ratified which refer to the ICSID Jurisdiction as a means of dispute settlement mechanism.

There are evident advantages of the ICSID Convention for both investors and host countries. Should a dispute emerge, it gives the investor easy access to an influential international forum. It enhances the investment climate for those states, more notably for developing states. But developing nations have worries that have caused some of them to withdraw, ignore the convention, or adopt defensive measures like terminating membership. At first, the complexity, length, and high cost of arbitration concerned developing countries. The absence of transparency at ICSID worries developing nations as well because some investment disputes involve public interests. The exclusion of local remedies and the lack of an appeal system are the other concerns about ICSID arbitration

In comparison, the ICSID convention provides several benefits over non-ICSID arbitration. It provides a mechanism for resolving disputes that include institutional support for the conduct of the proceeding in addition to procedural guidelines. It guarantees that the process won't be frustrating and makes provisions for the enforcement and recognition of awards. Ethiopia may also choose the laws and legal procedures that would apply to the issue. An individual investor may start a proceeding under the ICSID convention as a claimant. The potential for making an investment decision, From the host state's perspective, choosing arbitration as the method of dispute resolution enhances its environment for investment and is likely to draw additional foreign investment. It also protects itself against diplomatic protection by the investor's home state by agreeing to ICSID arbitration. As a result, Ethiopia's adherence to the convention would serve as an extra incentive and simulate a significant flow of international investment.

The fear that joining the ICSID will make it harder to control key areas of the economy, on a conceptual level, nevertheless, is exaggerated. This is due to the following reasons: first, the ICSID Convention does not impose any substantive obligations on the Member States (i.e., it is entirely procedural and depends on the parties' agreement); second, upon ratification or even later, Ethiopia can exclude a class (type) of dispute from the ICSID's jurisdiction; third, ICSID proceedings are not always automatic, as Ethiopia may demand that local remedies (national courts, etc.) be exhausted before arbitration can begin.

In Ethiopia's current investment treaties, ICSID is mentioned as a possible dispute resolution tool. Because the protection provided by the ICSID Convention, conceptually, represents and represents the respect between both the agreed states on investment promotion and development, the country's reservation undermines the perception of Ethiopia's commitment to the terms of the treaties and international agreements. Thus, joining ICSID will express a favorable, investor-friendly message to the global community and to foreign investors. Ethiopia will be able to influence and engage in the Center's governance as well as the Convention's regulations' revision process if it ratifies the Convention. To sum up, Ethiopia would be better placed to ratify the ICSID Convention than otherwise. The benefit ought ways the cost.

Though many countries continue to propagate a pessimistic view. They think that foreign investors are favored by international arbitration. Years of experience have shown that even developing nations may successfully employ the method. Numerous African and Caribbean nations, including Jamaica, as well as countries like Madagascar, Guinea, Gabon, Congo, Senegal, and others, have defended themselves in the center. They now have enough experience to manage investment disputes in an international tribunal. Respondent states do not fare worse in ICSID than in other arbitration forums and those investors do not always win. Since investors do not fare better in ICSID arbitration than in other types of investor-state arbitration, the criticism of bias applies equally to all investor-state arbitration, not just to ICSID arbitration.

For a poor country like Ethiopia, the ability to develop nations to handle disputes of this kind and the expense of defending such claims may seem frightening. Nevertheless, the World Bank pays for the ICSID secretariat in full and provides additional institutional support to the center, the costs are still considered modest and not excessive. Ethiopia would profit from the center's specialized service for resolving investment issues. ICSID is also the most transparent system and less costly than other investment dispute settlement mechanisms. In conclusion, if Ethiopia ratified the convention compared to other avenues, the ICSID usually entails a lesser financial burden.

The integrity of arbitral procedures appears to be better protected by the self-contained nature of ICSID arbitration, which renders it a system completely cut off from the control of national courts. The ICSID Convention would be better for Ethiopia concerning annulment since the grounds for annulment are codified in the Treaty, and are thus predictable and not dependent on domestic courts and laws of other jurisdictions.

specialization to ISDS. This aspect sets aside the ICSID from the rest of the ISDS fora, particularly due to its enforcement provisions. This fosters or is perceived to foster investors' confi-

dence while providing an avenue that is responsive to the needs of States as compared to other fora, which were essentially created for commercial arbitration. Ethiopia would be better placed to ratify the ICSID Convention than otherwise. The benefit ought ways the cost.

5.2 Recommendations

The analysis made on the cost and benefit of ratification of the ICSID Convention in the body part of the paper and the findings pin down above will lie to the following recommendation:

- Although an ICSID award with procedural flaws can be annulled, decisions with substantive errors are irreversible. Therefore, an appeal system should be set up to allow for the correction of legal errors that otherwise may unjustly harm developing countries.
- When interpreting the ICSID Convention, it will be challenging to foresee a result. This can be a powerful deterrent when choosing an arbitration facility particularly in situations where the definition of investment is not clear under the BITs, thus, there should be a clear-cut definition of the term investment under the ICSID Convention.
- A claimant's request for arbitration may be denied by the secretary general of ICSID for reasons specified in Art. 36 of the convention and Art. 2(2) institution regulation. Nonetheless, this could be misused. There is no mechanism in the convention to prevent this kind of misuse of power. Thus, it is necessary to implement a regulatory mechanism to monitor any potential abuse of authority by the secretary general in this regard.
- Almost all of Ethiopia's BITs would make it much simpler for corporations to sue the government before the ICSID without exhausting all available domestic remedies and without the option of having the award reconsidered. The development of a model bilateral investment treaty would assist Ethiopia in negotiating new or reconsidering existing BITs with explicit investor-state dispute resolution provisions that should limit consent to ICSID jurisdiction to certain classes of disputes after the exhaustion of domestic remedies.
- under Ethiopia’s BITs, there is also no indication that the proceeding, order, and award of the Tribunal should be publicly available. Needless to mention, in multilateral international negotiation the need to have well-qualified and skilled negotiators is necessary which developing countries lack, and developed nations might exploit this loophole. If developing countries established their minimum reservation point before the negotiation is started, they will outvoice the other side and secure their interests. And also model BIT.
- Ethiopia should develop a model BIT that addresses the current asymmetry of obligations hence need a careful and well-prepared negotiation approach is indispensable. One way of doing this is by drafting Model BIT. This will help the Country to have consistent and unified BITs and result in the predictability of the system. Thus, it is high time for Ethiopia to come up with its model BIT which strikes both the interest of the host state and investors.

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