

Dispute Settlement Mechanism under ICSID Convention

*Amrit Kharel**

Introduction

The Convention on the Settlement of Investment Disputes between States and Nationals of the other States (ICSID Convention), 1965 is one of the remarkable multilateral instruments which provides for dispute settlement mechanism (DSM) with due recognition of the 'individual' as the subject of international law. The convention has established the International Centre for the Settlement of Investment Disputes (ICSID) – though a separate international organization to facilitate conciliation and arbitration, having its close links to the World Bank¹ (WB) and collaborating with the latter in the advancement of various aspects of investment and arbitration law. The ICSID Convention, which contains detailed provisions on arbitration and conciliation between states and foreign nationals, places a foreign investor and the host state on the same footing, once both parties accept its jurisdiction.² With its most innovative concept of providing the individual investor an access to international DSM, the convention establishes private-investors-friendly international legal framework on investment protection. The convention puts in place 'an autonomous system free from municipal law'³ to settle the disputes between states and non-state investors of other contracting states.

* Part Time Lecturer, Nepal Law Campus, T.U. Advocate, Practicing Lawyer at Supreme Court, Nepal in the area of corporate and investment law.

¹ ANTHONY AUST, HANDBOOK OF INTERNATIONAL LAW (2nd ed), Cambridge University Press, Cambridge, UK, 350, (2010).

² MATTHIAS HERDEGEN, PRINCIPLES OF INTERNATIONAL ECONOMIC LAW, Oxford University Press, Oxford, UK, 4 (2013).

³ MALCOLM N. SHAW, INTERNATIONAL LAW, Cambridge University Press, Cambridge, UK, 1041 (6th ed. 2008).

Evolution of ICSID

In the early days of transnational businesses and flow of capital across national borders, most of the international business ventures used to be involved in foreign investment based on 'contractual agreements between private parties'.⁴ Foreign investors and local individuals, business firms, or financial institutions used to enter into such agreements. Thus investment disputes were mainly of private nature, which were settled through traditional means, ranging from court proceeding to amicable settlements.⁵ With growing needs of huge investment especially in the area of larger infrastructures, public utilities and such, foreign private investors of developed countries started to be involved in financing of large scale projects in smaller economies. Consequently, host state governments and private foreign nationals began embracing new relationships through foreign investment agreements in writing. As the number of agreements of this nature has been increasing from post-war period, investment disputes between the host state and foreign nationals has also been a common phenomenon of late.

Prior to the decade of 1960, diplomatic protection was most frequently used method to resolve this sort of investment disputes. Legal remedies available for a foreign investor against the wrongful treatment by the host state were often limited. First they had to recourse to the judiciary of host state and upon exhaustion of the local remedies, had to induce own home state to proceed the claims against the host state. Foreign investors were often reluctant to approach the courts in host state as domestic courts were bound to apply domestic law which might be insufficient to protect their international rights; those courts often fell short of territorial jurisdiction to adjudicate the foreign investment matters and above all, municipal courts were supposed to have certain national bias and lacking of technical expertise in dealing with the matter of international investment. Diplomatic protection also had several disadvantages because to be availed of such protection was not deemed as the right of the investor, rather it depended largely upon discretion of home state government, whether to take up the claim of its nationals or not.⁶ Provided that dispute could not reach a conclusion through negotiations, the home state had to resort to legal means of international arbitration or adjudication before the international court, which might resulted in tensions between the home and host states. Hence, dire need was felt for direct

⁴ James C. Baker & Lois J. Yoder, *ICSID and the Calvo Clause a Hindrance to Foreign Direct Investment in LDCs*, 5:1 JOURNAL ON DISPUTE RESOLUTION, 75, 76-77 (1989).

⁵ James C. Baker & Lois J. Yoder, *ICSID and the Calvo Clause a Hindrance to Foreign Direct Investment in LDCs*, 5:1 JOURNAL ON DISPUTE RESOLUTION, 75, 76-77 (1989).

⁶ Luis Ramirez-Daza, *Arbitration in International Economic Law*, 4 LIMA ARBITRATION, 9, 26 (2010/11).

arbitration between the host states and investor foreign nationals for the settlement of investment disputes, which was presumed to balance the concerns of both the parties.

Keeping these facts in mind, International Trade Organization (ITO) Charter of 1948 unsuccessfully yet attempted to regulate several aspects of international private investment but it could not come into existence. Later in 1966, the era of investor-state disputes under the rules and principles of diplomatic protection and exhaustion of local remedies was reversed by the creation of the ICSID.⁷ The ICSID Convention promoted and signed under the auspices of International Bank for Reconstruction and development (IBRD) on 18 March 1965, entered into force on 14 October 1966 establishing the ICSID as non-adversarial, more subdued or discreet, and more focused or specialized dispute resolution mechanism to deal with investment disputes.⁸ The convention which established ICSID as an international centre to facilitate conciliation and arbitration of investment disputes, not only encouraged states to refer disputes with foreign private investors to international arbitration tribunal,⁹ but primarily it empowered private investors to bring lawsuit against the concerned host states without prior exhaustion of available internal legal remedies.¹⁰ ICSID arbitration and conciliation are available, in principle, to host states that are contracting parties to the ICSID Convention and to investors whose states of nationality are contracting parties.

The idea of creating such an international vehicle for settling investment disputes between private investors and host states was mooted in 1961 by Aaron Broches, the then General Counsel of the WB¹¹ being inspired by general debate initiated by the Organisation on Economic Co-Operation and Development (OECD) in the late 1950s. The importance of ICSID Convention had been disseminated in such a way that most of the developing countries and least developed countries (LDCs) perceived its adoption and ratification as a testimony, imperative for having world-class recognition of safer destination to foreign investment. It was widely presumed that ratification of ICSID would serve as a sort of assurance to potential investors that they would always have recourse to this independent DSM should the government of the host states undermine their property rights¹² through

⁷ *Ibid* at 26

⁸ FRANCIS BOTCHWAY, *DOCUMENTS IN INTERNATIONAL ECONOMIC LAW*, Routledge, London, UK, 490 (2006).

⁹ SURYA P SUBEDI, *INTERNATIONAL INVESTMENT LAW: RECONCILING POLICY AND PRINCIPLE*, Hart Publishing Ltd. Oxford, UK, 31 (2008).

¹⁰ Luis Ramirez-Daza, *Arbitration in International Economic Law*, 4 *LIMA ARBITRATION*, 9, 26 (2010/11).

¹¹ SUBEDI, *Supra* note 9, 30.

¹² *Ibid.*, 31.

expropriation or other severe measures. The DSM under ICSID played a catalyst role for the conclusion of hundreds of bilateral investment treaties (BITs) which Professor Subedi notes as 'silent revolution'¹³ in international foreign investment law. The establishment of *Iran-US Claims Tribunal* in early 1980s to handle the claims submitted by US nationals, companies and businesses adversely affected by the Islamic revolution during the late 1970s in Iran, gave fresh impetus to international arbitration proceedings.¹⁴ With unprecedented expansion of globalization, countries traditionally hesitant to allow foreign private parties direct access to international DSM, also eventually changed their mindsets to embrace ICSID and BITs. While at the time of the inception of the ICSID, developing and developed states were polarized in a hot debate over the New International Economic Order (NIEO), rights and duties of the sovereign states and the principle of Permanent Sovereignty over Natural Resources (PSNR); gradually after 1980 onwards, most of the developing countries and LDCs became the signatories of the convention. As of 12 April 2016, total one hundred and sixty one countries¹⁵ are parties to the ICSID Convention among which, one hundred and fifty three states have deposited their instruments of ratification.

However, the governments of the Republic of Bolivia, Ecuador and Venezuela denounced the ICSID Convention in accordance with Article 71 of the convention respectively on 3 November 2007, 7 January 2010 and 25 July 2012. The denunciations were to a certain extent stimulated by the misuse of the instruments of ICSID and BITs for the benefits of foreign investors often at the expense of the host states and other societal values.¹⁶ In late 1990s and early 2000s, with the help of sophisticated lawyers and arbitrators, foreign investors deliberately made the most of the legal loopholes in the BITs and faulty contracts made with the governments under the influence of corrupt officials to secure the interpretations of BIT clauses and arbitral awards directing hefty compensation in their favour.¹⁷ The major reason asserted by these countries for such denouncement is the ICSID awards mostly 'favouring' the private transnational investors, which require the underdeveloped states to promptly compensate millions of dollars, eventually resulting weaker economies run out of their internal resources. For instance, President of Ecuador, Raphael Correa proclaimed that his country's withdrawal from the ICSID was necessary for "the liberation of our countries because [it]

¹³ *Ibid.*, 32.

¹⁴ SUBEDI, *Supra* note 9, 32.

¹⁵ *LIST OF CONTRACTING STATES AND OTHER SIGNATORIES OF THE CONVENTION*, ICSID/3, ICSID, Washington D.C. USA (2016) available at <http://www.worldbank.org/icsid>.

¹⁶ SUBEDI, *Supra* note 9, 32.

¹⁷ *Ibid.*

signifies colonialism, slavery with respect to trans-nationals with respect to Washington, with respect to the WB.”¹⁸ In the wake of global financial crisis, the Presidents of Bolivia and Ecuador at a UN conference in June 2009 declared that the ICSID should be disbanded.¹⁹ The denunciations of three countries bring the whole purpose and legitimacy of DSM under ICSID into question. It is important to see whether the provisions under ICSID Convention are that much deficient in their substances, structures and procedures as publicly criticized by the denouncing governments.

Institutional Arrangements of DSM

Chapter one of the convention covers the institutional framework of ICSID with its close links with IBRD. The seat of the ICSID shall be at the principal office of the IBRD that may be moved to another place by decision of the Administrative Council adopted by a majority of two third of its members.²⁰ The ICSID has an Administrative Council and a Secretariat, a Panel of Conciliators and a Panel of Arbitrators.²¹ The Administrative Council is composed of one representative of each contracting state and also an alternative may act as representative in certain cases of absence or inability of the principal representative in the meeting.²² The Governors of the WB are *ex officio* members of ICSID’s Administrative Council in the absence of a contrary designation by states parties to the Convention.²³ The President of the WB is *ex officio* the Chairman of ICSID’s Administrative Council.²⁴ On the basis of a 1967 agreement between the two institutions,²⁵ the WB provides ICSID with offices, services, facilities and even the administrative budget if it cannot be met out of charges for the use of its facilities.²⁶

The Administrative Council is authorized to adopt, *inter alia*, the rules of procedure for the institution of conciliation and arbitration proceedings²⁷ and rules of procedure for conciliation and arbitration proceedings.²⁸ The Administrative Council is the governing body for the amendment of the convention, vested with the right to

¹⁸ Leon E. Trakman, *The ICSID Under Siege*, 45 CORNELL INTERNATIONAL LAW JOURNAL, 603, 604 (2012).

¹⁹ *Ibid.*

²⁰ ICSID CONVENTION, Art. 2 (1965).

²¹ *Ibid.*, Art. 3.

²² *Ibid.*, Art. 4(1).

²³ *Ibid.*, Art. 4(2).

²⁴ *Ibid.*, Art. 5.

²⁵ CHRISTOPH H. SCHREUER ET AL., *THE ICSID CONVENTION: A COMMENTARY*, Cambridge University Press, Cambridge, UK, 14 (2nd ed. 2009)

²⁶ *Ibid.*, Art. 17.

²⁷ *Ibid.*, Art. 6(1)(b).

²⁸ *Ibid.*, Art. 6(1)(c).

decide by a majority of two-thirds of its member²⁹ on any proposed amendment by any contracting member.³⁰ Ratification, acceptance or approval of all contracting states is necessary for the amendment to come into force.

The ICSID Secretary-General elected by two-third majority of the Administrative Council for maximum six years term³¹ acts as the appointing authority of arbitrators for *ad hoc* arbitrations. The convention provides for the Panel of Conciliators and the Panel of Arbitrators consisting the persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment.³² Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators. Each contracting state may designate to each Panel four persons who may but need not be its nationals,³³ and the ICSID Chairman may designate ten persons each having different nationality to each Panel.³⁴ The Panel members designated by the Chairman must represent the world's principal legal systems and the main forms of economic activity.³⁵ The Chairman's power to designate Panel members is seen as desirable to ensure the fair representation on the Panels of qualified persons from both investing and receiving countries.³⁶ Panel members shall serve for renewable period of six years³⁷ and also a person may serve on both Panels.³⁸

Jurisdiction of ICSID

The Article 25(1) of the convention deals with the substantive question of jurisdiction of ICSID.³⁹ Any legal dispute arising directly out of an investment, between a contracting state (or any constituent subdivision or agency of a contracting state designated to the Centre by that state) and a national of another contracting state, which the parties to the dispute consent in writing to submit to the ICSID can only be settled through conciliation or arbitration proceedings. As mutual consent in writing is prerequisite to refer the dispute to ICSID arbitration, its jurisdiction is a voluntary one, but once the written consent has been given, no party has right to withdraw its consent unilaterally.⁴⁰ Such written consent

²⁹ *Ibid.*, Art. 66.

³⁰ *Ibid.*, Art. 65.

³¹ ICSID CONVENTION, Art. 10(1) (1965).

³² *Ibid.*, Art. 14(1).

³³ *Ibid.*, Art. 13(1).

³⁴ *Ibid.*, Art. 13(2).

³⁵ *Ibid.*, Art. 14(2).

³⁶ SCHREUER ET AL., *Supra* note 25, 50.

³⁷ ICSID CONVENTION, Art. 15(1) (1965).

³⁸ *Ibid.*, Art. 16(1).

³⁹ SCHREUER ET AL., *Supra* note 25, 82.

⁴⁰ ICSID CONVENTION, Art. 25(1).

can be given in one of the three ways. The host states and foreign investors can include dispute settlement clause referring to ICSID arbitration directly in the investment contracts.⁴¹ ICSID has developed several Model Clauses for this purpose. In another way to consent on ICSID jurisdiction for dispute settlement, host states can include such provision in their national legislation,⁴² especially law on foreign investment. Many capital importing countries have adopted such provisions. Foreign investors can directly initiate the proceedings if there is such provision available in the host country's law. Acceptance of the ICSID jurisdiction in the treaties, especially the BITs between the host state and home state of the investor is third method to have consent on referral of the investment disputes to ICSID.⁴³ Such consent to the jurisdiction of ICSID for the settlement of investment disputes is expressed in four recent multilateral trade and investment treaties:⁴⁴ The North American Free Trade Agreement (NAFTA), Energy Charter Treaty (ECT), Cartagena Free Trade Agreement (CFTA) and The Mercado Común del Sur (MERCOSUR) Protocol of Colonia for the Reciprocal Promotion and Protection of Investments. Article 1116 of the NAFTA and Article 26(1) of the ECT each provides for the scope of the consent to ICSID arbitration.⁴⁵

The ICSID Convention specifies that 'national of another contracting state' does not include any person having the nationality of the contracting host state party to the dispute and thus such person cannot invoke the ICSID procedure against state party⁴⁶ which means foreign investor having dual nationality, also of the host state cannot proceed with conciliation or arbitration under ICSID. Likewise, juridical person having its legal origination in the contracting state other than the host state can only take part in ICSID dispute settlement.⁴⁷ However, under ICSID Convention, even the legal person or a company having the nationality of the host state, but with foreign control, may be the control by foreign shareholders is treated as foreign investor and thus permitted to pursue justice through ICSID.⁴⁸ The state parties to the ICSID Convention are allowed, at anytime, to notify of the certain class or classes of disputes which it would or would not consider submitting to the jurisdiction of ICSID.⁴⁹ Based on this provision, China has accepted only disputes about compensation for expropriation or nationalization

⁴¹ SCHREUER ET AL., *Supra* note 25, 230.

⁴² *Ibid.*, 231.

⁴³ *Ibid.*, 233.

⁴⁴ AUST, *Supra* note 1, 352.

⁴⁵ SCHREUER ET AL., *Supra* note 25, 236.

⁴⁶ ICSID CONVENTION, Art. 25(2)(a) (1965).

⁴⁷ *Ibid.*, Art. 25(2)(b).

⁴⁸ *Ibid.*, Art. 25(2)(b).

⁴⁹ *Ibid.*, Art. 25(4).

whereas Saudi Arabia excludes disputes about oil or acts of sovereignty, and Turkey excludes disputes about land.⁵⁰

Exclusive Remedy Rule

The consent of the parties to arbitration under ICSID Convention is deemed to exclude resort to any other remedies as per the Article 26 of the convention which is commonly known as 'exclusive remedy rule'. This means that once the consent to ICSID arbitration is given, the parties lose their rights to seek relief in another forum, national or international; domestic courts are no longer available for disputes to be submitted to ICSID; and parties are confined to pursuing their claim through ICSID.⁵¹ This provision also features non-interference with the ICSID arbitration process once it has been instituted. Arbitration under ICSID is designed to proceed independently without support and interference of the domestic courts. Domestic courts may not issue orders to stay ICSID arbitral proceedings or to intervene in any other manner. The Arbitration Tribunal, if it considers that the circumstances so require, only recommend the provisional measures which should be taken to preserve the respective rights of either party⁵² pending the outcome of ICSID proceedings. ICSID arbitration is entirely self-contained, of the autonomous nature⁵³ and independent of national law. The disputing parties are provided with free choice of the applicable law in the arbitration. Arbitration Tribunal under ICSID usually decides a dispute in accordance with such rules of law as agreed by the disputing parties.⁵⁴ In the absence of such agreement, tribunal have to apply the law of the host state including its rules on the conflict of laws and such rules of international law as may be applicable.⁵⁵ The tribunal can also decide a dispute *ex aequo et bono* if the parties so agree.⁵⁶

In addition, the ICSID arbitration process is also insulated from inter-state claims, since the convention prohibits the contracting state to give diplomatic protection or to bring an international claim relating to the dispute which the host state and foreign investors have consented to submit or have already been submitted by the parties to arbitration, unless the losing state has failed to abide by and comply with the award rendered.⁵⁷ This guarantee against power oriented conflict resolution constitutes a strong incentive to host states to submit to ICSID

⁵⁰ AUST, *Supra* note 1, 351.

⁵¹ SCHREUER ET AL., *Supra* note 25, 351.

⁵² ICSID CONVENTION, Art.47 (1965).

⁵³ SCHREUER ET AL., *Supra* note 25, 351.

⁵⁴ ICSID CONVENTION, Art. 42(1) (1965).

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*, Art. 42(3).

⁵⁷ ICSID CONVENTION, Art. 27(1) (1965).

arbitration. The developing countries and LDCs otherwise would mostly remain vulnerable to power and political orientation by the capital exporting nations in the name of diplomatic protection of their investors' concerns.

Arbitration Proceedings

Either party to a dispute can institute the arbitration proceedings by addressing a request to that effect in writing to the Secretary-General who then sends a copy of the request to the other party.⁵⁸ Unless it is found on the basis of the information contained in the request that dispute is manifestly outside the jurisdiction of the ICSID, Secretary-General register the request⁵⁹ and arbitration tribunal is constituted⁶⁰ as soon as possible. If parties agree, the tribunal is formed of a sole arbitrator or any uneven number of arbitrators appointed by them.⁶¹ Where the parties do not agree upon the number of arbitrators and the method of their appointment, the tribunal usually consists of three arbitrators, one arbitrator appointed by each party and the third, who shall preside over the tribunal, appointed by agreement of the parties.⁶² If tribunal is not constituted within ninety days after dispatch of the notice of registration by the Secretary-General, or such other period as the parties may agree, the Chairman at the request of either party and after consulting both parties as far as possible can directly appoint the sole arbitrator or arbitrators. Arbitrators appointed by the Chairman should not be nationals of host state or home state of the foreign investors.⁶³ If the sole arbitrator or each individual arbitrator is not appointed by agreement of the parties, the majority of the arbitrators should be nationals of the states other than host state and home state whose foreign investor is a party to the dispute.⁶⁴ Except in the case of appointment by the Chairman, the disputing parties can appoint the arbitrators even from outside of the Panel of Arbitrators.⁶⁵ ICSID Convention ensures for smooth proceedings of arbitration even in case of noncooperation of a party. An ICSID arbitration can be held anywhere the parties agree, be it the Permanent Court of Arbitration (PCA) or any other appropriate institution, whether private or public,⁶⁶ not just at ICSID's headquarter.

⁵⁸ *Ibid.*, Art. 36(1).

⁵⁹ *Ibid.*, Art. 36(3).

⁶⁰ *Ibid.*, Art. 37(1).

⁶¹ *Ibid.*, Art. 37(2)(a).

⁶² *Ibid.*, Art. 37(2)(b).

⁶³ *Ibid.*, Art. 38.

⁶⁴ *Ibid.*, Art. 39.

⁶⁵ *Ibid.*, Art. 40.

⁶⁶ ICSID CONVENTION, Art. 63(a) (1965).

Interpretation, Revision and Annulment of the Award

There is no provision on appeal against an award but either party to arbitration proceedings can seek interpretation, revision and annulment of the award pursuant to Article 50 to 52 under the convention. ICSID Convention implies the arbitration award as a subject to annulment provided that irregularities are found in due course of arbitration proceedings mainly in the institutional, procedural and jurisdictional matters.

Recognition and Enforcement of the Award

An award is final and binding on the disputing parties and not subject to any appeal or to any other remedy beyond the limits of the convention.⁶⁷ It is most likely for the contracting parties of the convention to comply with the award in order to maintain amiable relation with the global fund provider, the WB that is sponsor of the ICSID. Under the convention, each member state, even if it is not party to dispute, is bound to recognize an award as binding and to enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that state.⁶⁸ This unique feature of legally owning the ICSID award by all member states in general and its universal enforcement by the courts of all states parties provide higher degree of efficacy and security to the foreign investors. The convention also sets forth some procedures for the enforcement which require all member states to designate the competent court or other authority for recognition and enforcement purpose.⁶⁹ A party to arbitration proceedings should submit a certified copy of an award to such court or authority. Execution of the award is governed by the laws concerning the execution of judgments in force in the state in whose territories such execution is sought.⁷⁰ These provisions enable the award creditor who will probably be benefitted by the enforcement to choose the most favourable state where there is availability of assets of the award debtor suitable for execution.⁷¹

The ICSID award contains such a binding force that places not only the disputing parties under legal obligations to abide by and comply with the award rendered, but also it obliges each member state equally to recognize and enforce the award. Each contracting state has to take such legislative or other measures as may be necessary for making the provisions of the convention effective in its territories.⁷²

⁶⁷ *Ibid.*, Art. 53(1).

⁶⁸ *Ibid.*, Art. 54(1).

⁶⁹ *Ibid.*, Art. 54(2).

⁷⁰ *Ibid.*, Art. 54(3).

⁷¹ SCHREUER ET AL., *Supra* note 25, 1124.

⁷² ICSID CONVENTION, Art. 69 (1965).

Failure of a state party to recognize and enforce an award would be a breach of a treaty obligation that may lead to same consequence of state responsibility, including diplomatic protection, which a party to arbitration proceedings is prone to meet upon noncompliance. Within ICSID enforcement framework, the home state of the successful foreign investor in ICSID arbitration could bring an international claim against a member state of the convention that was not a disputing party, merely upon consideration that domestic courts of such third state have failed to recognize and enforce the award in violation of Article 54 of the convention.⁷³ Such dispute over treaty obligation arising between contracting states that seeks interpretation or application of ICSID Convention, which is not settled by negotiation is referred to the International Court of Justice (ICJ) by the application of any party to such dispute.⁷⁴ In the case of a victorious host state, failure by the investor's state of nationality or by any other state party to the convention to recognize and enforce the award would also lead to the same consequence.⁷⁵ Generally, state immunity is applicable to property designated for the welfare of public at large, which will not be subject to execution but commercial property will not be subject to such immunity. State immunity in Article 55 is only referred to execution but not to recognition. Thus successful invocation of sovereign immunity will also have no substantial role in reversing the award debtor's obligation or altering the ratio of the given award. Refusal to comply with the award relying on state immunity shall lead to the revival of the right of diplomatic protection under Article 27(1) and may lead to the submission of the dispute to the ICJ in accordance with Article 64.⁷⁶

Unlike any other international law, the ICSID Convention, through its Article 64, provides for a means to invoke compulsory jurisdiction of the ICJ as an inter-state enforcement mechanism to ensure full compliance with arbitration award rendered on the investment disputes between the host country and foreign investor. Yet unused, this mechanism of last resort under ICSID Convention contains unbridled potential for any state to take the matters relating to non-execution of either its own rights on foreign investment regulation (in case of victorious host state) or the individual property rights of its private investor (in case of victorious foreign investor) before the ICJ, whereupon the issue of defending individual rights of a foreign investor or rights of the host state on regulating the foreign investment may further be drawn into the agenda for

⁷³ SCHREUER ET AL., *Supra* note 25, 1125.

⁷⁴ ICSID CONVENTION, Art. 64 (1965).

⁷⁵ SCHREUER ET AL., *Supra* note 25, 1125.

⁷⁶ *Ibid.*, 1154.

discussion at UN Security Council in case of non-compliance of the decision of the Court.

Limitations in the ICSID Convention

The convention does not have any provision to avert the false and perfidious claims for large amount of compensation by the powerful investors against the host developing countries and LDCs. The provision for taking the consideration of non-commercial public interests, such as health, safety concerns, environmental protection are not incorporated in the convention. There is absence of an appeal procedure against the arbitral award under the convention except for the limited annulment procedure. As the convention provides rights to the award creditor to claim for execution in any state where there is availability of assets of the award debtor, the public assets of the smaller host nations available anywhere are put into risk in each arbitral proceeding. The enforcement mechanism of the ICSID Convention puts its smaller member economies at serious risk of the international claims at ICJ from any other powerful state merely upon consideration of failure to recognize and enforce the award on the disputes, which are of no direct concerns of such states. These major weaknesses in the convention act as strong disincentives for smaller economies to make use of the ICSID arbitration.

Concluding Remarks

Based on above discussion, the ICSID Administrative Council is suggested to amend the Convention to set forth necessary provision on prevention of the pernicious claims against the host countries. A provision of compulsory mediation and conciliation prior to the investor-state arbitration should be incorporated in ICSID Convention that could help the parties to reconcile their interests in more convenient manner. Through the amendment, an appellate mechanism vested with the power to hear appeal against the arbitral award must be introduced. Likewise, the provision on interim measures to inhibit the interfering activities of the disputing parties and provision to give particular consideration to the non-commercial public interests of the host smaller economies should be included in the amended convention. Certain guidelines should be made to strike a right balance in between the economic interests of the investors and public interest concerns of the host countries.

The third party state having its substantial interest especially in the investment dispute relating to the natural resources in which two or more states have their common rights, should be granted with the rights to participate in the arbitration

under the amended convention. To avoid conflict of interests, ICSID Convention must have certain provision to regulate the involvement of arbitrators in the role of private legal counsel of the parties to investment disputes. An expert once served as an arbitrator, should be prevented to provide legal counsel and expert advices to any disputing parties in ICSID arbitration for certain period of time, may be two to three years period. The amended convention should offer specific concessions to the LDCs in arbitral proceedings including a ceiling on the hourly fees of arbitrators and on the arbitral costs particularly for the cases involving LDCs. In addition, a support mechanism should be established under ICSID Convention to provide free legal advice and concessionary legal counselling to the LDC host states during the arbitral proceedings. A mandatory provision to make proportionate representation of the LDCs in the designation of Panel members by the Chairman should explicitly be stated in the amended convention. Likewise, provision for due restraint to bring international claims against the LDCs at ICJ upon consideration of failure to recognize and enforce the arbitral award should also be incorporated in the ICSID Convention.

□□