THE ICSID AMENDMENTS: ANALYSING THE CHANGES TO THE ARBITRATION RULES AND WHAT THEY ENTAIL FOR CAPITAL IMPORTERS AND DEVELOPING COUNTRIES

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ABSTRACT

*The International Centre for the Settlement of Investment Disputes ["**ICSID**"] has been a monolith in the field of investment arbitration. However, one concern that has been perpetual regarding this institution is its general lean towards western capital exporters. Recently, on the 21st of March, 2022, the member countries assented to certain amendments in the rules which were ushered in through the six working papers. This article primarily looks at how these amendments, especially in the arbitration rules, will affect investment arbitration in developing countries with regards to the ICSID.*

In lieu of this, the article has been divided into three main parts, excluding the introduction, conclusion, and ancillary sections. First, the article briefly summarises the amendments brought about in the ICSID Arbitration Rules of the Centre and the Additional Facility Rules. Second, the article analyses the tentative impact that these amendments will have on how ICSID arbitration is approached from the perspective of developing countries and non-contracting parties. Third, the article proposes tentative changes that may be made to the amendments to further balance the scales between capital importers and exporters. The article concludes by acknowledging that, while not perfect, the amendments come as a positive development, with respect to ICSID Arbitration, especially for capital importers and developing countries.

1. INTRODUCTION

The ICSID was set up in 1996 through a multilateral treaty, the ICSID Convention ["**Convention**"], as a forum for addressing investor-state

discrepancies.[1] Since its conception, one demerit that has plagued this, and many other well-known international arbitration institutions,[2] is that they have a general lean towards western capital exporters rather than the developing countries where this capital is exported to.[3] However it is important to clarify that the existence of this 'lean', a position supported by a section of authors, cannot be attached solely to the institution itself, it has to do with the *process, players, and background* of investment arbitration that are connected with the said institution. While this statement may seem very broad, the assertion will become clear when we see the purpose of mentioning the seeming tilt towards developed countries.

The primary facet of this *'lean'* that we must keep in mind for the purpose of this article is the apparent bias of arbitrators (the abovementioned players) in favour of investor claimants. This is supported by the fact that arbitrators often give legal interpretations to rules and principles that are in the favour of capital exporters like the United States ["**US"]** or the United Kingdom.[4] Apart from apparent bias, the costs and drawn-out process of international investment arbitration average at around 8 million US dollars and can reach values of up to 30 million US dollars.[5] This may not be feasible for developing countries, which may not have the specialisation or legal expertise to deal with investment arbitration in the first place.[6] The cherry on the top comes in the form of unequal bargaining power, where host states are often forced to give up on their own economic viability,

1. International Centre for the Settlement of Investment Disputes, 'About ICSID' https://icsid.worldbank.org/About/ICSID accessed 2 August 2022.
2. Aniruddha Rajput, 'Chapter 8: India and ICSID' in Rajput (ed); *Protection of Foreign Investment in India and Investment Treaty Arbitration* (Kluwer Law International 2017) 171-194.
3. Olivia Chung, 'The Lopsided International Investment Law Regime and Its Effect on the Future of Investor-State Arbitration' (2006-2007) 47 Va. J. Int'l. L. 953.
4. Gus Van Harten, 'Pro-Investor or Pro-State Bias in Investment-Treaty Arbitration? Forthcoming Study Gives Cause for Concern', (International Institute for Sustainable Development, 13 April 2012) https://www.iisd.org/itn/en/2012/04/13/pro-investor-or-pro-state-bias-in-investment-treaty-arbitration-forthcoming-study-gives-cause-for-concern/ accessed 10 January 2023.
5. United Nations Conference on Trade and Development, *Latest Developments in Investor-State Dispute Settlement* IIA Issues Note No. 1 (2010) UNCTAD/WEB/DIAE/IA/2010/3 https://unctad.org/system/files/official-document/webdiaeia20103_en.pdf accessed 17 February 2022.
6. Anton Strezhnev, 'Why Rich Countries Win Investment Disputes: Taking Selection Seriously' (2017) https://static1.squarespace.com/static/5931baca440243906ef65ca3/t/59c55e2829f187ed71aba071/1506106921710/why_rich_countries_win_investment_disputes.pdf accessed 17 August 2022.

sustainable growth, and public policy mandates in order to persuade wealthy nations to invest in their country (the background).[7] This can be seen from the fact that most of the bilateral investment treaties ["**BIT**"] entered into in the 1990s and early 2000s were more of a dictation of terms by a Western power that the developing countries could either "leave or take".[8] The model can be explained by the circumstance that there was competition for foreign investment during this time. BITs entered by the United States with developing countries like Nicaragua or Honduras, while technically negotiable, always took the form of the model that the US had drafted.[9]

It is considering this, that India, while partaking in the field of foreign direct investment ["**FDI**"], is a non-signatory to the ICSID Convention.[10] This view was substantiated by the Indian Council for Arbitration, which had advised the Finance Ministry against joining the ICSID Convention back in 2000.[11] The reason given by the Ministry can be summarised in two points:

1) The general lean of ICSID towards western capital-exporting states.

2) The lack of review that the ICSID process entails, both under the touchstone of the Indian Judicial System and public policy.[12]

While some of these shortcomings have been addressed by the Model Bilateral Investment Treaty that India adopted in 2015,[13] there can be no denying the fact that overall, the ICSID process is still not completely impartial or aligned with the interests of developing countries. The word *'process'* gains emphasis at this junction, as it indicates that it is not solely

7. Rajput (n 2).
8. Chung (n 3).
9. Todd Allee and Clint Peinhardt, 'Evaluating Three Explanations for the Design of Bilateral Investment Treaties' (2014) 66(1) World Politics 47.
10. Simon Weber, 'What Happened To Investment Arbitration In India' (*Kluwer Arbitration Blog*, 27 March 2021) http://arbitrationblog.kluwerarbitration.com/2021/03/27/what-happened-to-investment-arbitration-in-india/ accessed 11 August 2022.
11. The Hindu Business Line Bureau Press Release, 'ICA Against India Joining Global Dispute Settlement Body' https://www.thehindubusinessline.com/todays-paper/tp-others/article29064097.ece accessed 22 August 2022.
12. *Ibid*.
13. Abhisar Vidyarthi, 'Revisiting India's Position to Not Join the ICSID Convention' (*Kluwer Arbitration Blog,* 2 August 2020) http://arbitrationblog.kluwerarbitration.com/2020/08/02/revisiting-indias-position-to-not-join-the-icsid-convention/ accessed 7 August 2022.

the institution (barring a few areas such as rules relating to public policy, as we have already seen), but rather external components such as high costs, tilted agreements, and arbitrator bias that eventually act as a burden to developing countries.

Recently, on the 21st of March 2022, the member States of ICSID approved the amendments to the ICSID Rules and Regulations ["**Amendments**"].[14] These amendments are the culmination of six working papers issued between 2018 and 2021. The Amendments aim to "optimise" the current ICSID process. While these Amendments were not drafted with capital importers in mind, they will have an impact on how the said importers associate with ICSID Arbitration. In light of this, the article will explore how individual amendments made to the arbitration rules affect the domain of investment arbitration in developing countries, especially those like India that are not signatories to the Convention. Once this aspect has been aptly analysed, the article will also ponder over certain changes that may be made to the Amendments that will further facilitate balancing the scales between developed and developing countries with respect to ICSID Arbitration.

Additionally, for the purpose of this article, the terms *'capital importers'* and *'developing countries'* have been majorly used interchangeably throughout. While this generalisation may seemingly lack nuance, the reason behind making the same for the specific purpose of this article is that a majority of Investor State Dispute Settlement ["ISDS"] claims are against developing countries, which are the host states for investment. Around 80% of recent ISDS claims are against *'developing countries or transition economies'*, with more than 70% being brought by investors from developed countries (statistics for 2019).[15] While in the recent global discourse, even developed countries like the United States have become a hub for foreign investment,[16] grouping on the basis of the terms *'capital*

14. International Centre for Settlement of Investment Disputes, 'ICSID Rules and Regulations Amendment' https://icsid.worldbank.org/resources/rules-amendments#collapse- accessed 9 October 2022.
15. United Nations Conference on Trade and Development, 'Investor-State Dispute Settlement Cases Pass the 1,000 Mark: Cases and Outcomes in 2019' (July 2020) UNCTAD/DIAE/PCB/INF/2020/6 https://unctad.org/system/files/official-document/diaepcbinf2020d6.pdf accessed 12 January 2023.
16. Jannick Damgaard and Carlos Sanchez-Munoz, 'United States is World's Top Destination for Foreign Direct Investment' (*International Monetary Fund Blog*, 7 December 2022), https://www.imf.org/en/Blogs/Articles/2022/12/07/united-states-is-worlds-top-destination-for-foreign-direct-investment accessed 12 January 2023.

importers' and *'developing countries'* is to portray that investor claims are usually against developing countries brought by a developed investor.

Further, *'non-contracting parties'* are those countries that are not signatories to the ICSID Convention. The impact of the Amendments on the first two categories and 'non-contracting parties', that are developing countries is mostly similar, and the same will be explained subsequently. A minor difference arises in the case of 'non-contracting parties', with some of the Amendments affecting them to a greater extent. This will also be explored in detail in the further sections.

2. A BRIEF SUMMARISATION OF THE ARBITRATION AMENDMENTS

Article 25(1) of the Convention lays down that the jurisdiction of the Centre will only encompass the contracting states to the Convention and their nationals.[17] India, not being a signatory,[18] is governed by the Additional Facility Rules ["**AFR**"], which, as per Article 2, provides for dispute resolution through arbitration even when the parties are not contracting states to the Convention.[19] These AFRs were also subject to the recent amendments, with changes being made to an almost identical tune as the Centre's Arbitration Rules.

One of the prime amendments was the provision related to the disclosure of the identity of third-party funders.[20] The proviso of third-party funding in international arbitration, which has been subject to dissonance because of issues like conflicts of interest between funder and arbitrator,[21] is largely unregulated in the Indian context.[22] Rule 23 of the Amended AFR of Arbitration provides that the identity of this third-party, who is a juridical person, must be duly revealed. What is more is that *'identity'* in the case

17. 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), art. 25.
18. Abhisar (n 13).
19. ICSID Additional Facility Rules and Regulations for Arbitration ('ICSID Additional Facility Rules') (March 2022), art. 2.
20. ICSID Additional Facility Rules (March 2022), r. 23.
21. South American Silver Ltd v. The Plurinational State of Bolivia PCA Case No 2013-15, Procedural Order No. 10, para 70.
22. Amita Katragadsa, Bipin Aspatwar, Shruti Khanijow and Ayushi Singhal, 'Third Party Funding in India' (*Cyril Amarchand Mangaldas,* 2019) https://www.cyrilshroff.com/wp-content/uploads/2019/06/Third-Party-Funding-in-India.pdf accessed 23 August 2022.

of a juridical person would mean the owner of the firm or company that provides the funds.[23]

Another very pertinent change is the provision for expedited arbitration ["**EA**"], as was added by Chapter XIII of the AFR.[24] This envisages a much quicker and potentially cheaper arbitration process, where the maximum time for declaration of the award is 380 days from the date of the first session.[25]

Lastly, and no less important to our discussion on the impact of the Amendments on developing countries, is the increased ambit of the jurisdiction related to ICSID Arbitration under the AFR.[26] What the AFR now provide is that even when *both* the parties or their nationals are not contracting states, they will still have access to arbitration proceedings under the Additional Facility Secretariat.[27] The implication of this change when seen with the other amendments will have a large impact on ICSID Arbitration in developing states, as has been expounded upon in the later sections of the article. While the amendments that have been summarised in this section, they do not cover all the substitutions and transpositions that have been ushered in by the six working papers, those that have been mentioned cover the relevant bases that are necessary to analyse how the Amendments will impact capital importers.

3. ANALYSIS OF THE AMENDMENTS THROUGH THE LENS OF DEVELOPING COUNTRIES AND NON-CONTRACTING PARTIES

On the surface, the amendments seem to have been able to solve several problems that were associated with ICSID Arbitration.[28] Working Paper 6, which is a culmination of the deliberations that had taken place prior to finalising the text of the Amendments, highlights some of these concerns and how they were attempted to be solved. Aspects such as conflict between

23. Dr. Julia Grothaus and Hannes Ingwersen, 'Modernising ICSID: New Rule Amendments Get Go-Ahead from Member States' (*Linklaters,* 19 April 2022) https://www.linklaters.com/en/insights/blogs/arbitrationlinks/2022/april/icsid-rules-finalised-amendments accessed 15 August 2022.
24. ICSID Additional Facility Rules (March 2022), ch. XIII.
25. ICSID Additional Facility Rules (March 2022), r. 81.
26. AFR, art. 2 (n 19).
27. *Ibid*.
28. Yarik Kryovi, 'ICSID Arbitration Reform: Mapping Concerns of Users and How to Address Them' (*Kluwer Arbitration Blog*, 11 November 2018) http://arbitrationblog.kluwerarbitration.com/2018/11/11/icsid-arbitration-reform-mapping-concerns-of-users-and-how-to-address-them/ accessed 3 August 2022.

arbitrators and external funders and access to investment arbitration for smaller parties are some of the problems deemed to have been dealt with.[29] However, these *"problems"* are different for investors and investees, and it is with this statement in mind that the amendments will be analysed.

Before we move on to said analysis, let us understand the *'lens'* against which the amendments will be scrutinised. For the purposes of this article, *interests* and *inclusivity* of developing countries are the two main criteria that will be used to judge the amendments. What these terms entail is that we will first see the extent to which the Amendments set off the problems that ICSID Arbitration poses for capital importers (the process, players, and background aspects that were explored in the first section of this article). This will be followed by a look into how much the Amendments aid in increasing the inclusivity (ease of participation) of these countries in the arbitration process.

A. Third-Party Funding

Third-Party Funding ["**TPF**"], in the scope of international commercial or investment arbitration, can be defined as a situation where a disinterested (no direct relation to the dispute) entity may fund one of the parties in return for a certain percentage of damages or proceeds that the funded party might get on getting a favourable award.[30] This aspect of TPF, which may be used by less prosperous parties and states (especially, developing countries) to offset the high cost of "ISDS",[31] seems like a good way to provide *'access to justice'* to said parties. However, the on-ground situation is very different, with these outside or third-party funders preferring to fund claims not *'for'* but *'against'* such developing countries. These countries, due to not having the legal capacity to defend themselves properly or not wanting to ruin their international reputation, choose to settle for "*unmeritorious claims"* with unfavorable terms, which benefits the third-party funder and the opposite party.[32] Further, even where TPF is used to finance a respondent from a

29. International Centre for Settlement of Investment Disputes, 'Background on Working Paper # 6' (12 November 2021) https://icsid.worldbank.org/sites/default/files/publications/Backgrounder_WP.pdf accessed 10 October 2022.
30. International Council for Commercial Arbitration, *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration* (ICCA Report No. 4, April 2018), 14.
31. E De Brabandere and Julia Lepeltak 'Third-Party Funding in International Investment Arbitration' (Fall 2012) 27(2) ICSID Review - Foreign Investment Law Journal 379.
32. Brooke S Güven, Karl MF Lockhart and Michael R Garcia, 'Chapter 14: Regulating Third-Party Funding in Investor-State Arbitration Through Reform of

developing state, the disproportionate cost of paying back the funder will still have to be borne by the people residing in that country in the event of an adverse award.[33] Thus, the need for having a coherent regulatory framework related to the aspect of TPF in ICSID becomes crucial.

Rule 23 of the AFR has fulfilled this 'need' to a limited extent,[34] as summarised above, "*direct"* or "*indirect*" Third Party Funders are mandated to disclose their identity to the Secretariat under this rule. While this is a step in the right direction, Rule 23 does not solve all the developmental concerns of TPF. Several authors have pointed out that the, mere disclosure of basic details regarding external funders, that too in a private capacity, will do very little when it comes to safeguarding the interests of developing countries against the malicious intentions of many of these third-party funders.[35] While 23(4) does provide that the tribunal *'may'* order the third parties to provide additional information regarding the funding agreement,[36] this *may* not prove to be efficacious considering that the only discrepancy that tribunals are looking out for is whether there is a conflict of interests between the funders and the arbitrators.[37] The intent behind such funding and whether it is detrimental to the *"sustainable development"* model that the ICSID envisages is delved into.[38]

Therefore, while the essence of this change did have capital importers at its base (intentionally or unintentionally), the way in which it is worded and executed has left a lot to be desired. This can be seen as an instance which shows us how the problems faced by developed and developing countries are different (or rather incongruous). For exporters, only arbitrator bias against funders had to be dealt with. However, for importers, apart from the said bias, even the intention of the funders themselves with respect to developmental goals must be tackled.

ICSID and UNCITRAL Arbitration Rules: Holding Global Institutions to Their Development Mandates' in Anderson and Beaumont (ed), *The Investor-State Dispute Settlement System: Reform, Replace or Status Quo?* (Kluwer Law International, 2020) 296, 297.

33. Brabandere (n 31).
34. ICSID Additional Facility Rules (March 2022), r. 23.
35. Brooke (n 32).
36. AFR 23(4) (n 20).
37. Brooke (n 32).
38. Brook Güven and Lise Johnson, 'Third-Party Funding and the Objectives of Investment Treaties: Friends or foes?' (*International Institute for Sustainable Development,* 27 June 2019), https://www.iisd.org/itn/en/2019/06/27/third-party-funding-and-the-objectives-of-investment-treaties-friends-or-foes-brooke-guven-lise-johnson/ accessed 15 August 2022.

To do this, a narrower and more specific clause, that would investigate the intent of such funding, is something that would have helped in balancing an already tilted scale. (How this may be achieved will be dealt with in the later part of this article).

B. The Provision for Expedited Arbitration

As has been previously elucidated in the article, the cost and time of ISDS is often very burdensome for developing states and parties from such states.[39] Therefore, the provision relating to EA in the newly introduced Chapter XII of the AFR may tempt the states that, in the ordinary course, would not be able to bear the costs of full drawn arbitration proceedings - to opt for ICSID Arbitration.[40] This chapter provides for a situation where the parties can mutually agree to undergo the EA process,[41] select the number of arbitrators,[42] and even choose to opt out of EA where there is a change in the situation or severity of the dispute.[43] With an average ICSID arbitration proceeding taking 3.6 years to conclude,[44] the EA mechanism comes as a pleasant relief to many developing countries and parties who may have wanted to partake in arbitration under the ICSID rules. EA as envisaged under Chapter XII of the AFR provides for a major reduction in the time taken for the arbitration process to conclude, as can be understood from the illustration given below:

> *"First Session (30 days from Constitution of Tribunal) + Claimant First Memorial (60 days)+ Respondent Counter Memorial (60 days)+ Claimant reply to counter memorial (40 days)+ Respondent rejoinder (40 days)+ Hearing (60 days) + Statements and Written Submissions on Cost (10 days) + Award (120 days)."*[45]

39. United Nations Conference on Trade and Development,'World Investment Report 2012: Towards a New Generation of Investment Policies' (5 July 2012) https://unctad.org/system/files/official-document/wir2012_embargoed_en.pdf accessed 17 February 2023.
40. UNCTAD (n 5).
41. ICSID Additional Facility Rules (March 2022), r. 75.
42. ICSID Additional Facility Rules (March 2022), r. 76.
43. ICSID Additional Facility Rules (March 2022), r. 86.
44. Anthony Sinclair, Louise Fisher and Sarah Macroy, 'ICSID Arbitration: How Long Does it Take?' 4(5) Global Arbitration Review https://www.goldreserveinc.com/wp-content/uploads/2016/01/ICSID-arbitration-How-long-does-it-take.pdf accessed 17 February 2023.
45. ICSID Additional Facility Rules (March 2022), r. 81.

A pertinent point to note is that representation is cumulative, meaning, under the illustration above, the Claimant's First Memorial must be filed within 60 days of the conclusion of the First Session. The exception to this is the calculation of the time period of the Award, which will start after the conclusion of the Hearing. Thus, the maximum time for the hearing to be held is 260 days after the conclusion of the first session [which is envisaged to be heard remotely as per 80(2)][46] and the maximum time for the declaration of the award is 380 days from the date of the first session.

This procedure for EA drastically reduces the time taken for the conclusion of arbitration under the ICSID, and as already pointed out, comes as a positive change for developing countries that may not have the manpower or resources to engage in a prolonged arbitration process.[47] However, a problem that may still crop up in cases where a dispute arises with capital exporting parties is that they may be reluctant to agree to the EA process. This hesitance on their part may be due to legitimate reasons, such as the novelty of the procedure. On the other side of the coin, the reasons may not always be "*legitimate",* and might be a ploy to pressurize the developing countries that may not have the resources to continue on with the process and will have to give in to the settlement. This problem can be rectified with a few tweaks, as will be discussed later in the article. However, once these tweaks are ironed out, EA can act as a game changer for developing countries with limited resources or smaller claims. Not only will the monetary problem be solved, but this streamlined process will also help in situations where the importers have limited legal infrastructure or dispute resolution expertise.[48]

C. Increased Ambit of Jurisdiction under the AFR

The AFR, as they stood in 2006 (previous iteration of amendments), did visage providing arbitration facilities where "*either the State party to the dispute or the State whose national is a party to the dispute is not a Contracting State*."[49] What the Amendments have done is broadened the

46. ICSID Additional Facility Rules (March 2022), r. 80(2).
47. Diana Rosert, 'The Stakes Are High: A Review of the Financial Costs of Investment Treaty Arbitration' (International Institute for Sustainable Development, July 2014) https://www.iisd.org/system/files/publications/stakes-are-high-review-financial-costs-investment-treaty-arbitration.pdf accessed 17 February 2023.
48. Steven Burkill and Aaron Murphy, 'The 2022 ICSID Rules – What do They Mean for Asia?' (*Watson Farley and Williams,* 20 April 2022) https://www.wfw.com/articles/the-2022-icsid-rules-what-do-they-mean-for-asia/ accessed 14 January 2023.
49. ICSID Additional Facility Rules (Unamended as in 2006), art. 2.

either-or model to a *both* model.[50] Now, ICSID Arbitration can be provided under the AFR even where:

"*1) Neither of the parties is Contracting Stateor a party of a Contracting State.*

*2) A Regional Economic Integration Organisation ["***REIO***"] is a party to the dispute*."[51]

For the purposes of our discussion, this article will mainly focus on point one. However, as under point two, now even when REIO's like the Association of Southeast Asian Nations are a party to the dispute,[52] arbitration can be availed under AFR. What point one essentially brings to the table is a provision for two non-signatories to the Convention to avail arbitration under the ICSID Secretariat. The Indian Model Bilateral Investment Treaty ["**BIT**"] stipulates submission of the dispute to arbitration under the ICSID AFR in Article 16.[53] The scope of this provision can now be widened to include situations where both the parties are non-contracting states, say for example, where an investment dispute arises between India and Libya under the BIT entered between the two.[54] This greatly increases utility of ICSID Arbitration to non-signatories, a majority of whom are developing countries.[55]

4. CONTEMPLATING THE IMPACT OF EXPEDITED ARBITRATION AND BROADENED JURISDICTION BOTH INDIVIDUALLY AND JOINTLY

Part III of this article has already analysed what the amendments may entail for capital importers and developing countries. Keeping this in mind, the present Part will only deal with the impacts that the abovementioned changes will have on the way in which arbitration under the ICSID is approached.

50. Sebastian Seelmann-Eggebert and Stephanie Forrest, 'A New Chapter for ICSID: 4 Key Amendments to the ICSID Rules' (*Latham and Watkins*, 24 March 2022), https://www.lw.com/admin/upload/SiteAttachments/Alert%202946.v5.pdf accessed 14 January 2023.
51. AFR, art. 2 (n 19).
52. Association of Southeast Asian Nations, 'About ASEAN' https://asean.org accessed 9 October 2022.
53. Government of India, 'Model Text for the Indian Bilateral Investment Treaty' https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf accessed 17 February 2023.
54. Agreement between the Republic of India and the Great Socialist People's Libyan Arab Jamahiriya for the Promotion and Protection of Investments (adopted 26 May 2007) https://dea.gov.in/sites/default/files/Libya.pdf accessed 17 February 2023.
55. Anton (n 6).

When we look at the aspect of EA individually, a high likelihood arises that disputes between developing countries under the ICSID will become much more convenient. If both the parties to the dispute (a capital importer, on one hand, and an investor from a developing country, on the other) have a general lack of resources,[56] it is only logical to assume that they would opt for the EA mechanism, which would greatly reduce the time and cost of arbitration, apart from being less burdensome on the country or individual investors. This would entail a general shift in how ISDS will be approached, especially between developing countries, with the possibility that ICSID arbitration will become the preferred choice of dispute settlement in such situations. When both these changes are read together, we see that even the non-contracting states and parties from such states have the provision of availing themselves of the mutually advantageous situation that has been laid down above. Thus, providing for a positive environment where such states can avail the benefits and convenience that arbitration under the ICSID provides, without taking on the risks or responsibilities that come with becoming a signatory to the Convention.[57]

5. AMENDING THE AMENDMENTS: SUGGESTIONS

After having objectively analysed the Amendments, it can be inferred that the Amendments may act as a weight on the side of capital importers in an already tilted ISDS model under the ICSID. However, in some respects, they fail to account for aspects that need attention or have some missing elements. Pursuant to this, the article puts forth certain suggestions that could further make ICSID Arbitration equitable:

A. Substantive Public Policy

One of the prime contentions of developing countries against arbitration under ICSID is that there is not ample scope for review of the awards with respect to the public policy of the respective country.[58] Article 53(1) of the ICSID Convention and Rule 70(4) of the AFR on arbitration clearly provide that an ICSID award shall be binding and cannot be challenged in local judicial bodies.[59] The grounds for annulment are only limited to procedural

56. *Ibid.*
57. Crina Baltag; 'The Risk of Investment under the ICSID Convention' (*Transnational Dispute Management5*, 2006) www.transnational-dispute-management.com/article.asp?key=893 accessed 17 February 2023.
58. Rajput (n 2).
59. Flughafen Zürich AG and Gestión e Ingenería IDC SA v Bolivarian Republic of Venezuela ICSID Case No ARB/10/19.

issues like corruption, improper constitution of the tribunal, among others.[60] There is no express provision providing that the award can be tested on the touchstone of state interest or public policy. When such a provision is provided for in the New York Convention,[61] it entails that it can feasibly be incorporated in the ICSID Convention, as well. The degree and strictness of this departure from policy may be kept very narrow,[62] but a provision that provides for are course where this narrow interpretation has been met, ideally, should be available. While this may hamper the aspect of *'finality'* of the award, the positives may be said to outweigh the negatives because, (i) This change will consider the interest of the host country by mandating public policy, which is a model that has recently come into the limelight. This can be seen through the modernised Energy Charter Treaty, which goes as far as to allow *'regulatory change'* in the interest of public policy such as human rights.[63] (ii) The scope of appeal that is being suggested is a narrow one, and it is only when the legitimate interests of the host country are violated that it should be invoked. (iii) This model has already been successfully implemented in the domain of investment arbitration (as we have seen with the New York Convention), thus already has a precedent on which it can base itself.

B. Purposive TPF Clause

As has already been contemplated in this article, the requirement of only the name and address of the funder does not adequately tackle the issue of TPF and unscrupulous claims against developing countries.[64] Keeping this in mind, the Amendments could have envisaged a more purposive clause. One of the ways in which this could have been achieved is by inclusion of a new sub-clause to Rule 23 of AFR saying, "*The Tribunal **shall** order disclosure*

60. Christopher P. Moore, Laurie Achtouk-Spivak and Zeineb Bouraoui, 'ICSID Awards' (*The Guide to Challenging and Enforcing Arbitration Awards* 2nd edn., Global Arbitration Review, 8 June 2021) https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/2nd-edition/article/icsid-awards accessed 23 August 2022.
61. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 38 (New York Convention) art. V(2)(*b*).
62. Enron Nigeria Power Holding Ltd v. Federal Republic of Nigeria et al ICC Case No. 14417/EBS/VRO/AGF.
63. Energy Charter Secretariat, 'Finalisation of the negotiations on the Modernisation of the Energy Charter Treaty' (June 24, 2022) https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2022/CCDEC202210.pdf accessed 17 February 2023.
64. Brooke (n 32).

of further information regarding the funding agreement and the non-party providing such funding in a case where the claim submitted substantially goes against the development-oriented standards of the ICSID." While this may seem very broad and ambiguous, tribunals should ensure that capital importers do not take advantage of this clause, and it is only invoked when the third parties are funding the claims maliciously, on unsubstantiated or improper grounds, with disregard for the capital importer's situation or public welfare. The wording of the sub-clause is merely suggestive, and one with more refined wording may be introduced if it contains the purpose for which the above suggestion has been propounded.

C. Unbiased Implementation of the EA Process

Rule 88(2) of the AFR lays down that the Tribunal will have the power to decide if an arbitration should no longer be expedited, based on relevant facts and circumstances, upon the request of a party. Working on the same logic, a clause should be implemented that allows for *submission* of the dispute to EA, at the discretion of the Tribunal, when one of the parties' requests for the same. As this article has already discussed, the reasons for rejection of the EA process may not always be legitimate, and the Amendments should take this into account so that the purposes for which EA was added (convenience, streamlining and reduction of costs) can be fulfilled. This change will also be in favour of developing countries, which will want to opt for the EA mechanism wherever it is applicable, to prevent unnecessary loss of already limited resources.

6. CONCLUSION

It has rightly been said by Samuel Gompers, the founder of the American Federation of Labor, "*Do I believe in arbitration? I do. But not in arbitration between the lion and the lamb, in which the lamb is in the morning found inside the lion*". In this light, it is essential that we level the playing field in ISDS and streamline it, if the system is expected to continue functioning.[65] The Amendments come as a positive change which align with this *"essentiality",* and while not consciously, make the process of ICSID Arbitration more appealing to developing countries, capital

65. UNCITRAL Report by the Kingdom of Bahrain on reforming procedural aspects of ISDS for UNCITRAL Working Group III , 'Possible reform of investor-State dispute settlement (ISDS): comments by the Kingdom of Bahrain' (31 July 2019) https://uncitral.un.org/sites/uncitral.un.org/files/uncitral_wg_iii_bahrain_submission_31_july_2019.pdf accessed 17 February 2023.

importers and non-signatories to the Convention. Barring a few points that the Amendments have overlooked, it can safely be said that the merits outweigh the demerits. This is just the first of hopefully many steps towards bringing capital exporters and importers on par.