SHOULD MYANMAR JOIN THE INTERNATIONAL CONVENTION FOR THE SETTLEMENT OF INVESTMENT DISPUTES?

Introduction
In an investment dispute between a foreign investor and the Government of the Union of Myanmar, there are several institutions and rules which can be used. According to UNCTAD data, of the 739 known investment dispute proceedings to date, 480 are administered by ICSID, the International Centre for the Settlement of Investment Disputes, 88 by the Permanent Court of Arbitration, 67 had no institution and the remaining 50-odd cases were spread out over the other institutions.

ICSID has a dominant place in the world of investment arbitration. ICSID was created in 1965 as one of the five organizations forming the World Bank, and is the only arbitration tribunal which was created in such institutional context. There are currently 161 members to the ICSID Convention [See https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx], an imposing high number compared to 193 members of the United Nations. However, there are also some notable absences from the list of members, such as India and Vietnam, countries that perhaps decided not to join, and even countries that have left ICSID while heavily criticizing its workings.

As can be seen above from the table, ICSID is only one of several means internationally available to Myanmar to settle disputes with its foreign investors through international arbitration, albeit clearly the most sought after one. Therefore, when we look into the pros and cons of ICSID for Myanmar, the question we are really asking is: how does ICSID arbitration differ from non-ICSID arbitration, and how will this difference affect Myanmar?

In that context, where ICSID is undeniably prominent but also criticized, we examine in this note if Myanmar should join ICSID. Is it in the benefit of Myanmar to join ICSID? What are the pros and cons of such a move?
What Are the Pros and Cons of ICSID Arbitration for Myanmar Compared to Non-ICSID Arbitration?

Each arbitration institution and framework, such as ICSID, UNCITRAL/PCA and ICC has its merits in terms of the enforcement of the award, the process, the way to challenge it, even the costs. But, ICSID is much more than an institution only. It is the only one which comes with its proper international legal framework in the ICSID Convention. That sets it apart from any other, non-ICSID form of arbitration.

A good part of deciding whether joining ICSID is a good idea for Myanmar is to compare ICSID arbitration with non-ICSID arbitration from a Myanmar perspective. That is the purpose of this section.

It is much harder for Myanmar to refuse enforcement of ICSID arbitration

When an investor wins a non-ICSID award against Myanmar, this is a foreign arbitration award which may require recognition and enforcement in Myanmar or elsewhere, most likely under the New York Convention. Local courts, most importantly Myanmar courts, could use one of several grounds, even under the New York Convention, such as “public policy”, to refuse recognition or enforcement. That is not possible with ICSID awards. They are already considered final and as having final national court decisions as per the ICSID Convention.

This is perhaps the most important difference between ICSID and non-ICSID arbitration. It is, we believe, probably the most important reason why some countries do not join ICSID.

As a member of ICSID, Myanmar can appoint arbitrators and influence administration of investment arbitration in general

Under the ICSID Convention, the Panel of Arbitrators is only selected by Contracting States, except for ten arbitrators who are chosen by the Secretary-General. After joining, Myanmar would have the right to appoint four arbitrators and four conciliators. In any cases facing Myanmar, arbitrators are nearly entirely derived from the lists chosen by states, potentially with consideration for state interests. However, on any particular dispute, arbitrators of the same nationality of the parties are strongly discouraged [Only allowed if the arbitrator is in the minority or if both parties agree; art. 39 ICSID Convention].

Furthermore, as a member, Myanmar can influence the way ICSID is organized through its representation in the Administrative Council.

By using arbitration with a secretariat, like ICSID, Myanmar is better protected from illegitimate claims, and the process is more productive

In many cases, investment contracts between the Myanmar Government and a foreign investor provide in international arbitration, for example under UNCITRAL Rules, without reference to any institution. We believe that investment arbitration with a secretariat is better than without a secretariat.

Having a secretariat also means that
there is an institution to screen the claim by an investor. Without it, in ad hoc arbitration, an investor could start an arbitration proceeding even when it is not legitimate to do so, but there is so institution to stop him.

An ICSID arbitration is more likely to apply Myanmar law

Under the ICSID Convention, parties can choose any law they want. Myanmar would be entitled to choose Myanmar law in its investment contracts, for example. However, if there is no agreement between the parties on the subject, the law of the contracting state applies “and such rules of international law as may be applicable” [Art. 42 (1) ICSID Convention]. There is thus a default referral to the law of the state, Myanmar law. The same does not apply in UNCITRAL, ICC or the PCA.

We believe that it is clearly in the advantage of Myanmar that Myanmar law will apply in case no specific mention was made in the contract.

Annulment and setting aside awards is not subject to any national law for ICSID arbitration

Once a non-ICSID arbitration award has been reached, the laws of the country where that award was made could be used to set it aside. That cannot happen in an ICSID arbitration. Instead, ICSID has a self-contained system for annulment within the ICSID Convention by an ad-hoc Committee of three arbitrators, independent from the parties and from national courts.

As Myanmar is unlikely to be the seat of arbitration in non-ICSID arbitration, we believe it is better for Myanmar that annulment of awards only takes place within ICSID before a highly experienced ad-hoc Committee rather than before some national court in Singapore, London or The Hague. Myanmar’s chances will be better before the ad-hoc Committee. In addition, there may be many stages of appeal in national legal systems, leading to additional costs and delays.

ICSID arbitration is generally less expensive than non-ICSID arbitration

How much an arbitration proceeding costs depends on a great deal of factors. But, experts take the view that ICSID cases are generally less expensive [ICSID cases cost on average between 3 to 6 M$ in legal and institutional fees, and last around 3 years]. This is in large part because no national setting aside or enforcement proceedings need to be added to the case. Also, ICSID uses a fixed schedule of fees for the arbitrators. Many other institutions do not.

We believe that this is an important benefit for Myanmar, because budget appropriations require more certainty in planning and Myanmar’s budget is smaller than that of most.

Non-ICSID arbitration can be quicker

Often, ICSID arbitrations take longer. This is due to delays in the choice of arbitrators from the Panel and the time needed to choose a chairman. An average ICSID case can take 3 year. The shortest case was 1.2 year and the longest case 10.5 years. The average ICC case is 9 months [Anthony Sinclair, Louis Fisher, Sarah Macrory, ICSID Arbitration How Long Does It Take? GAR Journal, vol. 4 issue 5].

ICSID arbitration is more transparent, for better or worse

ICSID publishes the names of the parties of each case, and at least some excerpts of the legal reasoning of the tribunal, even without the parties consent. However, proceedings can be held behind closed doors when one of the parties so requests.

Myanmar’s Dispute Settlement Mechanisms in Existing Investment Treaties

Myanmar is currently party to 10 bilateral investment treaties (BITS), six of which have entered into force, as well as to a number of multilateral agreements as a member of the ASEAN, and the ASEAN Comprehensive Investment Agreement.

All of these BITS provide for dispute settlement mechanisms that include international arbitration [Please note that the BITS with Kuwait and Vietnam are not yet publicly available and therefore are not set out in this table]:

Be Pitiless or Be Penniless: Practical Pointers on Enforcing Commercial Debts in Myanmar, 16 February 2017, Yangon.
<table>
<thead>
<tr>
<th>Myanmar Investment Treaty</th>
<th>Dispute Settlement Mechanism</th>
<th>Characteristics</th>
</tr>
</thead>
<tbody>
<tr>
<td>China BIT</td>
<td>After negotiations, a dispute may be submitted to: 1. Competent court of the contracting party, party to the dispute 2. Arbitration under: a. ICSID Convention; or b. Ad hoc tribunal.</td>
<td>• After negotiations, an investor may choose between three mechanisms of dispute settlement: national courts or international arbitration. • For arbitration: choice is given among either ICSID or an ad hoc tribunal.</td>
</tr>
<tr>
<td>Korea BIT</td>
<td>After negotiations or consultations, a dispute may be submitted to: 1. Competent court of the contracting party, party to the dispute; 2. Arbitration under: a. ICSID Convention if it is available; b. ICSID Additional Facility if it is available; c. UNCITRAL; or d. Any other arbitration institution.</td>
<td>• Typical ASEAN dispute settlement clause • After negotiations or consultations, an investor may choose between two mechanisms of dispute settlement: national courts or arbitration. • For Arbitration: choice of various arbitration proceedings, including ICSID and ICSID Additional Facility. • Currently, only ICSID Additional Facility is available in practice under this BIT.</td>
</tr>
<tr>
<td>ASEAN Comprehensive Investment Agreement</td>
<td></td>
<td></td>
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<tr>
<td>ASEAN-india Comprehensive Investment Agreement</td>
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<td></td>
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<tr>
<td>ASEAN-China Comprehensive investment agreement</td>
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<tr>
<td>ASEAN-Korea Comprehensive investment Agreement</td>
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<tr>
<td>Japan BIT</td>
<td>After negotiations, a dispute may be submitted to: 1. Arbitration under: a. ICSID Convention if it is available; b. ICSID Additional Facility if it is available; c. UNCITRAL; or d. Any other arbitration institution.</td>
<td>• Only Myanmar BIT that does not mention national courts - if consultations fail, only international arbitration is mentioned. • Mention of two possible set of possible arbitration (including ICSID and ICSID Additional Facility) in addition to ad hoc arbitration. • ICSID arbitration or ICSID Additional Facility arbitration is not a choice and depends on ICSID membership of the parties. • Currently, only ICSID Additional Facility is available in practice under this BIT.</td>
</tr>
<tr>
<td>India BIT</td>
<td>After negotiations, a dispute may be submitted to: 1. Competent court of the contracting party, party to the dispute; 2. Conciliation; 3. Arbitration under: a. ICSID Convention, if it is available; b. ICSID Additional Facility, if it is available; or c. UNCITRAL.</td>
<td>• After negotiations or consultations, an investor may choose between three mechanisms of dispute settlement: conciliation, national courts or arbitration. • For Arbitration: choice of various arbitration proceedings, including ICSID and ICSID Additional Facility. • ICSID arbitration or ICSID Additional Facility arbitration is not a choice and depends on ICSID membership of the parties, neither of which are available currently under this BIT.</td>
</tr>
<tr>
<td>Israel BIT</td>
<td></td>
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<tr>
<td>Lao PDR BIT</td>
<td>After negotiations, a dispute may be submitted to: 1. Competent court of the contracting party, party to the dispute; or 2. Arbitration under: a. ICSID Convention, if both parties are members; or b. UNCITRAL.</td>
<td>• After negotiations or consultations, an investor may choose between three mechanisms of dispute settlement: conciliation, national courts or arbitration. • For Arbitration: choice of various arbitration proceedings, including ICSID and ICSID Additional Facility.</td>
</tr>
<tr>
<td>Thailand BIT</td>
<td></td>
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<tr>
<td>Philippines BIT</td>
<td>After negotiations, a dispute may be submitted to: 1. Competent court of the contracting party, party to the dispute; 2. Arbitration under: a. UNCITRAL.</td>
<td>• Narrowest BIT with regards to dispute settlement: after negotiations, only national courts or UNCITRAL arbitration is mentioned. • Only BIT which does not provide for ICSID arbitration.</td>
</tr>
</tbody>
</table>

To the exception of the Myanmar-Philippines BIT, all BITs executed by Myanmar provide for the possibility to settle investment dispute via ICSID arbitration. This is also the trend in all of the investment agreements executed by the ASEAN.

All BITs executed by Myanmar since June 2008 (as well as all ASEAN investment agreements) provide for the possibility of arbitration under the ICSID Additional Facility. The ICSID Additional Facility are a set of arbitration rules that are outside the ICSID Convention but that enable parties to a dispute to use the facilities offered by ICSID when one (or both) of them is not a member of ICSID. These rules are very similar to the rules provided under the Convention.

Dispute settlement mechanisms would not need to be amended in case Myanmar joins ICSID. Ratifying the ICSID Convention will not change Myanmar’s substantial obligations but
will provide an alternative dispute settlement mechanism to both Myanmar and foreign investors.

**Will Myanmar Be Overwhelmed With Claims After Joining ICSID?**

Most research shows that the highest number of claims against states does not take place immediately after that state joins ICSID, but at least 10 years after that. For most countries, there are just a few cases started within the first 5 years of joining ICSID. There is no reason to believe that joining ICSID will lead to an immediate surge in cases [Larisa Babiy, Adam Czewoja Sheikh, Blerina Xheraj, “Should Mexico Join ICSID?”, CTEI Working Papers, 2012].

(We updated and amended the below table from the similar one made Babiy, Sheikh and Xheraj in 2012 see footnote 7)

<table>
<thead>
<tr>
<th>ASEAN member state</th>
<th>Known investment arbitration cases since 1987 (as defendant)</th>
<th>Known investment arbitration cases since 1987 (as claimant)</th>
<th>Member of ICSID since (entry into force)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brunei</td>
<td>0</td>
<td>0</td>
<td>Not an ICSID member</td>
</tr>
<tr>
<td>Cambodia</td>
<td>0</td>
<td>0</td>
<td>2005</td>
</tr>
<tr>
<td>Indonesia</td>
<td>7</td>
<td>0</td>
<td>1968</td>
</tr>
<tr>
<td>Laos</td>
<td>3</td>
<td>0</td>
<td>Not an ICSID member</td>
</tr>
<tr>
<td>Malaysia</td>
<td>3</td>
<td>3</td>
<td>1966</td>
</tr>
<tr>
<td>Myanmar</td>
<td>1</td>
<td>0</td>
<td>Not an ICSID member</td>
</tr>
<tr>
<td>Philippines</td>
<td>5</td>
<td>0</td>
<td>1978</td>
</tr>
<tr>
<td>Singapore</td>
<td>0</td>
<td>3</td>
<td>1968</td>
</tr>
<tr>
<td>Thailand</td>
<td>1</td>
<td>0</td>
<td>Became an ICSID member in 1985 but never ratified the accession.</td>
</tr>
<tr>
<td>Vietnam</td>
<td>4</td>
<td>0</td>
<td>Not an ICSID member</td>
</tr>
</tbody>
</table>

ASEAN countries seldom have investment claim cases against them. There have not been any nationalization or currency devaluation policies by any ASEAN member, which are the main drivers of investment arbitration claims.

Myanmar has very few BITs in force at this time compared to most other countries. Joining ICSID alone does not mean ICSID will have jurisdiction over any case, or over all cases from investors from a certain country. For that to happen, the individual investment contract between the Myanmar Government and the foreign investor must refer to ICSID, and presently none of such contracts do this. Alternatively, the jurisdiction of ICSID must have been accepted by Myanmar in the applicable BIT, as is the case with most of Myanmar’s existing BITs to date.

**Why Do India, Thailand and Vietnam Not Join ICSID, and Why Did Venezuela, Ecuador and Bolivia Leave?**

Different countries have different reasons for not wanting to join or leaving ICSID.

India traditionally has had a reputation of court interference with international arbitrations, whether they are seated in or outside India. Although this trend was reversed in two recent landmark decisions of the Indian Supreme Court [Bharat Aluminium Co v. Kaiser Aluminium Technical Services Inc; and Shri Lal Mahal Ltd. v. Progetto Grano Spal], experts have often raised the pros and cons of the ICSID enforcement system in connection with India.

The Thai Government lost a high profile arbitration case in 2004 in connection with the construction of a Rapid Transit facility in metropolitan
Bangkok, resulting in damages and loss of face for the Government, and again in 2009, in connection with the Don Muang tollway project. As a result, in 2009 the Government decided that infrastructure contracts were no longer allowed to provide in foreign arbitration. Thailand never ratified ICSID, after joining in 1985.

Vietnam did not lose any high profile investment cases yet, but it is fair to say Government officials were spooked by the 3.7 Billion US$ claim of the Mackenzie v Vietnam investment arbitration case in 2010 (even though Vietnam later ended up winning). Vietnam was later forced to settle another case [Nguyen Manh Dzung, MCI Arb & Dang Vu Minh Ha, ‘Vietnam – An arbitration-friendly seat’ in Young Arbitration Review Edition 19 – October 2015]. In 2006 it was announced that Vietnam would join ICSID, but it still has not done so.

Indonesia did not renounce ICSID but in the wake of one ICSID decision on jurisdiction which did not go Indonesia’s way, it did announce it would renegotiate all its BITs to exclude access to all arbitration for foreign investors [Churchill Mining Plc v Indonesia – (Indonesia ended up winning this case in December 2016)].

Venezuela, Ecuador and Bolivia, embarked on a nationalization program from 2004 onwards. As a result, they received a long list of investment claims from their investors. As a result they have left the ICSID framework in 2009 and 2012 stating that the ICSID system favors investors and wealthy countries, and erodes the sovereignty of developing countries.

Another often heard complaint, and not only by developing countries [Australia announced measures to curtail access to investment arbitration in the wake of being challenged by Philip Morris on its plain packaging rules in Philip Morris Asia Limited (Hong Kong) v. The Commonwealth of Australia] , is that under a strict reading of older investment treaties there was not enough room for a state’s good faith and non-discriminatory regulatory power. One example is the ICSID battle Uruguay, a small and rather poor developing country, was forced to pay for (with a donation from a US billionaire) to fend off claims by tobacco giant Philip Morris in connection with its anti-smoking regulations, which the investor saw as expropriation of its trademarks [Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7 (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay).] (Uruguay later won the case).

Conclusions and Recommendations

*Will Myanmar attract more foreign investment if it would join ICSID?*

If Myanmar concludes more BITs and joins ICSID, which provides the highest standard in enforcement of investment arbitration awards, it sends a signal to the international business community that Myanmar is not afraid to commit itself to respecting international arbitration decisions and international law. That certainly has a positive effect on the way investors regard Myanmar, and on the reputation of Myanmar.

But the number of BITs in force, or ICSID membership are not the most important considerations when investors make investment location decisions. Economic factors are the most important factors, the size of the market, availability of infrastructure, cost of production inputs, labor costs. The largest factor driving FDI in ASEAN has for decades been cost reduction. For legal and regulatory issues, investors look more at the domestic legal order as a whole, stability, clear regulations, foreign ownership restrictions, and the absence of corruption.

And indeed, there is little or no evidence that ICSID arbitration, or BITs in general, do anything to increase FDI for a developing country. To cite Mary Hallward-Driemeier of the World Bank: “analyzing twenty years of bilateral FDI flows from the OECD to developing countries finds little evidence that BITs have stimulated additional investment” [ Mary Hallward-Driemeier, “Do Bilateral Investment Treaties Attract FDI? Only a bit… and they could bite”, available at http://documents.worldbank.org/curated/en/113541468761706209/105505322_2004111716010/additional/multi0page.pdf ].

Joining ICSID fits very well in Myanmar’s new openness to foreign investment, and it will enhance Myanmar’s reputation as a country that will respect international law, but few additional foreign investors will come to Myanmar just because it joins ICSID. Some countries, also in Asia, do very well in terms of FDI without joining ICSID.

What are the pros and cons for Myanmar joining ICSID?

We made this table to give an overview of what we consider to be the most important pros and cons:
Is ICSID biased in favor of foreign investors, or in favor of wealthy countries?

We think that ICSID is not biased in favor of investors. States win in roughly half of the cases before ICSID tribunals. More likely, the fact that investors are indeed protected from host states is the normal and intrinsic consequence when a framework of BITs and FTAs is created exactly to protect those foreign investors. The bias is baked into the system in the first place.

Of course ICSID favors wealthy countries. That is to say, the international investment protection system intrinsically favors capital exporting countries. There is nothing that can be done about that. More and more, developing and former developing countries use the ICSID system to their benefit when they invest overseas. Malaysia, for example, now has an equal number of investment arbitration cases as a claimant and as a defendant.

Our recommendation

What makes ICSID so strong is that there is no way for a country to block the final award from being enforced. Under the New York Convention this possibility, although limited, remains to exist. That feature of ICSID is in our view a major factor for countries such as India, Thailand and Vietnam to stay outside of the system. There is always the possibility that the Government would lose a case and is ordered to pay damages to foreigners in a situation which is difficult to understand for the public at large. In the non-ICSID enforcement system, cynically speaking, there is always the last resort: for a local court to declare the award to be contrary to the country’s own laws or public policy, and ignore it.

That is in fact exactly why we believe that Myanmar should join ICSID. Not because this will lead to more foreign investment (it won’t), and not because ICSID arbitration is faster or cheaper (often it will not be), but because states behave better, in the long term, when they are accountable for their actions, i.e. they do not have the option of ignoring legitimate international arbitration awards.

Ignoring awards, or blaming ICSID or wealthy countries is an easy way out, but does nothing to fix what is wrong both within the BIT system and with the treatment of foreign investors by developing countries. It is always tough to set high standards for oneself, and in some particular future case Myanmar may regret having done so, but this is how we improve ourselves. In other words, Myanmar should choose to pursue the highest standard, the path towards to improving Government administration, due process and transparency, not the road of the easy and politically convenient way out.

Ways for Myanmar to protect itself when joining ICSID

There are things that do not work well in the BIT or the ICSID system for Myanmar, and Myanmar should make sure it makes improvements where possible. Here are some of the important points of action for Myanmar, particularly if it wishes to join ICSID, but we are certain other equally important points can be made with further study:

1. ICSID arbitration does not abrogate domestic rules on sovereign immunity [Article 55 ICSID Convention]. It is therefore imperative that Myanmar’s rules on sovereign immunity are looked at again and modernized.

2. All Myanmar BITs and FTAs should exclude bona fide regulatory action from the provisions on...
expropriation (as the Myanmar BIT with Korea already has) or fair and equitable treatment. This is to ensure Myanmar can take regulatory measures on a non-discriminatory basis within reason without having to compensate foreign investors;

3. In its future BITs and FTAs, Myanmar should consider adopting a long list of restrictive clauses, such as:

- Excluding (indirect) protection of investors who are in fact nationals;
- Excluding dual nationals from protection;
- Designating certain contracts (such as construction contracts) as not being “an investment”;
- Limiting the protection to approved investment projects (especially since the Myanmar Investment Law 2016 no longer distinguishes between the two);
- Introducing a requirement to exhaust local remedies up to a certain reasonable period, such as 18 months to give a chance for authorities to settle the dispute; and
- Other measures.

4. Myanmar should consider excluding certain territories (for example territories where there is strife in Myanmar) from arbitration under ICSID, as is allowed under art. 70 of the ICSID Convention;

5. Myanmar should consider excluding certain classes of disputes and even certain designated projects from arbitration under ICSID, as is allowed under art. 25 (4) of the ICSID Convention;

6. Contracts concluded by Myanmar’s states and regions are also within the jurisdiction of the ICSID Convention under art. 25(1), but with approval by the Union (art. 25 (3) ICSID Convention). Myanmar should make designations and notifications to implement this.

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VDB Loi’s Disputes team comprises Myanmar qualified trial lawyers, litigators and foreign arbitration specialists (resident in Myanmar) who exclusively work on litigation and arbitration matters. We focus on a broad range of commercial disputes, labour cases, construction disputes, insolvency and debt enforcement. In 2016, the disputes team booked a significant win when it was able to secure the release and clear the employee of a foreign state agency from criminal charges in connection with a fatal accident.