CAN THE ICSID CONVENTION BE A MODEL LAW FOR INVESTMENT DISPUTE SETTLEMENT? : A PERSISTENT SERIES OF QUESTIONS

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Introduction: Asking the right questions.

"*Small questions lead to small discoveries. Bigger questions lead to bigger discoveries. Some questions only reveal deeper mysteries. Asking enormous questions can create enormous problems, while asking too many questions can make you look ridiculous. And when you come across an unusual question, there's not much else to do, but to stick with the question and see where it takes you.*"

– Grant Snider.[2]

The proposed question for this study indeed struck me as an unusual one. The ICSID Convention (International Centre for Settlement of Investment Disputes)[3] as a "model law" for investment disputes? The idea of having something like a model law, at least according to me, was unheard of in the field of international investment law. In fact, I recalled having studied that the ICSID Convention, also known as the Washington Convention, was not very central to the investment law universe anyway.[4] In any case, wasn't the whole idea of the ICSID Convention to provide only for *settlement of investment disputes?* Isn't that distinct from a "model law", something that sovereign nations tailor their legislations on?

As it turns out, the proposed question was also an enormous one. What *is* model law? The notion of a model law was popularized through the UNCITRAL Model Law on International Commercial Arbitration, adopted in 1985.[5] Surely there existed

1 5th year, National Law University, Jodhpur.

2 Grant Snider, Asking Questions, available at https://betterqs.wordpress.com/2015/09/08/asking-questions-by-grant-snider/

3 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 575 U.N.T.S. 159 [hereinafter referred to as the "ICSID Convention"]

4 Ankita Mishra and Disha Kapoor, ICSID – Numero Uno, Not Anymore? (2014) SIPL International Law journal, available at: http://www.spilmumbai.com/uploads/article/pdf/icsid-%E2%80%93-numero-uno-not-anymore-27.pdf

5 UNCITRAL Model Law on International Commercial Arbitration, 24 ILM 1302 (1985) [hereinafter referred to as the "UNCITRAL rules"]

credible reasons why this particular instrument became accepted as a "model" in the field of commercial arbitration. *What could be the possible aspects of a law that contribute to giving it the status of a "model" law?*

This final question builds the central academic premise of my study. Once answered, it would clarify, in the very least, the questions we began with. It would seem that in order to find out whether the ICSID Convention can operate as a "model law" for investment arbitrations, a two-step methodology must be adopted. First, we must identify the constituent elements of a "model" law, the UNCITRAL rules being our primary source of reference.

And second, these factors must be juxtaposed with the ICSID Convention for comparison to see whether it can, in fact, operate as a "model" law for the world of investment arbitration. Interestingly, since the ICSID Convention from 1966 pre-dates the UNCITRAL rules, the question probably could also be: *is* the ICSID a model law for investment arbitrations?

In order to give context to this issue, I begin with a comparison between the two types of arbitrations that are under analysis here: commercial arbitration, the type governed by the UNCITRAL rules and investment arbitration, the type instituted under the ICSID framework. This would provide a basis for understanding how the UNCITRAL and ICSID operate in the fields of commercial and investment arbitrations. It also provides a greater perspective on the position, in terms of legal significance, that these two instruments hold in their respective regimes. In this regard, significant reliance has been placed on two excellent academic articles contained in a book titled *Pervasive Problems in International Arbitration.*[6] Both have been instrumental in shaping my understanding of the problem.One provided me the complete perspective regarding the relationship between the two branches of arbitration using a beautiful analogy and the other cautioned restraint with regard to excessive interaction between the two.

6 Nigel Blackaby, Chapter 11: Investment Arbitration and Commercial Arbitration (Or the Tale of the Dolphin and the Shark) in Pervasive Problems in International Arbitration (Eds. Loukas A. Mistelis & Julian D.M. Lew QC), Kluwer Law International (2006), pp. 217-233 [hereinafter referred to as "Blackabay (2006)"]; Gabrielle Kaufmann-Kohler, Chapter 13: Interpretation of Treaties: How do Arbitral Tribunals interpret Dispute Settlement provisions in Investment Treaties in Pervasive Problems in International Arbitration (Eds. Loukas A. Mistelis & Julian D.M. Lew QC), Kluwer Law International (2006), pp. 257-261 [hereinafter referred to as "Kaufmann-Kohler (2006)"]

Hence, this work is in three parts. Part I introduces the problem at hand. Part II conducts the aforementioned comparison between investment and commercial arbitrations. Finally, Part III discusses the possibility of the ICSID Convention acting as a model law for investment arbitrations. Part IV concludes.

In the quest to find the answer to the initial proposed question, this work seeks to ask several subsequent questions, both big and small, hoping to unravel maximum number of mysteries with minimal ridiculousness. And where answers have not been so easily found, an attempt has been made to see where all these questions lead.

The Dolphin and the Shark: Comparing the two regimes.

i. Something fishy: Making the case against interaction

Blackaby invokes the image of a water-tanker at a zoo to explain the idea of interaction between the two classes of arbitration.[7] He asks whether it would be wise to put two seemingly similar species, the dolphin and the shark (depicting commercial and investment arbitrations, one way or the other), in the same water-tanker. His hypothesis is that if there exist concrete differences between the two, then they are two different species and it would be inadvisable to put them both in the tank together. His belief is that if commercial and investment arbitrations are indeed distinct genres of arbitration, then cross-adopting concepts and ideas between them would not be a good idea. His end conclusion is that the dolphin and the shark, much like commercial and investment arbitration, *are* different species and that too much interaction between the two is not in the interest of anyone.

The comparison in his piece begins by noting a rise of investment arbitrations in the beginning of the 20th Century. He describes: "(there was a rise in the) hitherto little-known species in the otherwise well-chartered waters of international arbitration…earlier protected by HMS Diplomatic Protection"[8] The scenic infusion in literature, describing the "sporadic catches" in the early 1990s, continues with this analogy:

7 Blackaby (2006), p. 217
8 Id.

"No doubt the increased catches by individual investors were due to their recent rights to sail in treaty claim waters formerly reserved for states alone. No longer did the claimant investor have to convince its home state to set sail from the safe harbor of international relations on its behalf. State claims were suddenly democratized and a small trickle of brave adventurers has eventually led to a small armada of private investors leaving port."[9]

ii. Two school of fish: Identifying the differences in the two species

Out of the several reasons given for distinction between the two regimes of arbitration, eight important ones will be discussed here. At least one significant conclusion will be drawn regarding the two regimes after the discussion of each distinction.

The first relates to the source of consent. In commercial arbitrations, the source of consent to arbitrate emanates either from the arbitration clause whose breach is under debate (*clause compromissoire)* or a specific agreement (also known as a "submission agreement") to refer a particular dispute to arbitration (*compromis)*. Further, the disputing parties are the parties to the contract or submission agreement and the arbitration is limited to disputes that arise out of (or in connection with) the specific contract. Article 18 of the UNCITRAL requires equality of treatment between the disputing parties and the ability to present its case. In this respect, there is great clarity with regard to the dispute settlement process in commercial arbitrations. The same is not the case with the investment regime. These source their consent from a treaty signed by a sovereign state. However, this applies only to the state itself and the consent for the covered investor is exhibited through his or her submission of a request for arbitration. Under this wing of distinction, a sovereign state, though providing for a wide spectrum of possible dispute resolution options, is unaware of the identify of the litigant investor till the very end. This is the reason why investor arbitrations are known as "arbitration without privity".[10]

Before moving to the second distinction, it must be noted that the angle of 'impact on sovereignty' is only displayed in investment arbitrations. In its aim was to "depoliticize" the investment dispute settlement process, these arbitrations give the

9 Id.

10 Jan Paulson, "Arbitration without Privacy", 10 ICSID Review, FILJ 232 (1995) as seen in Blackaby (2006)

claimant the ability to directly institute a case against a sovereign state. This leads to the complete removal of a sovereign's diplomatic cover and as a feature, this is peculiar only to the investment regime. In this regard, Article 27(1) of the Convention provides:

"No Contracting Shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another contracting state shall have consented to submit or shall have submitted under this Convention unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute."[11]

Hence the import of the first distinction is that disputing parties, in commercial arbitration have a greater knowledge of their opponent's position because of commercial privity.

Further, the concern regarding concession of sovereignty is an issue particular to investment arbitrations because of the possible impact adverse decisions can have on the ability of a country to take regulatory steps. This can be evidenced by the famous *Methanex* case, where a ban on the sale and use of the gasoline additive known as MTBE (methyl tertiary-butyl ether) by the State of California in the US, lead to a claim for approximately $ 970 million.[12]

The next layer of distinction relates to the negotiating period. Investment arbitration agreements usually provide for a three to six month "cooling off" period before which arbitration cannot be imitated.[13] The parties are required to negotiate amongst themselves with the objective of reducing the possibility of actual arbitration. The probability of coming to a mutually agreeable solution increases as the state gets a chance to engage in discussions with the disgruntled investor. This fits perfectly into the parties' desire to avoid lengthy arbitral proceedings, which can tend to get quite expensive due to, among other reasons, the value of the investment itself.

However, it is noted with concern that this practice is not taken very seriously by the states and that it is being reduced to a mere formality. It has been held that failure to comply with the same would not lead to invalidation of the jurisdiction of an investment arbitration tribunal.[14] On the other hand, a provision for such a

11 Article 27(1), UNCITRAL Rules

12 Methanex v. United States (2005) 44 ILM 1345

13 Blackaby (2006), p. 220

14 Ronald S. Lauder v. The Czech Republic, Final Award, 3rd September 2001, paragraphs. 187 & 190, available at: http://www.italaw.com/cases/610

negotiating period is becoming increasingly popular in commercial arbitration. The debate regarding "multi-tiered" arbitrations has been accelerated on account of a flurry of recent cases on the matter.[15] Multi-tiered arbitrations are peculiar for containing what are now popularly known as "escalation clauses", which are provisions that envision a step-wise application of the various stages of dispute resolution. A typical escalation clause would obligate the parties to first engage in mediation and conciliation, *failing which* they would be allowed to arbitrate. This two-step structure results in the arbitration acquiring a "multi-tiered" character.

Thus, it can be seen that though this factor should play a pivotal role in investment matters, States choose to ignore it at their own detriment. Whereas the same is not required as such in commercial cases but parties are recognizing its importance and increasingly warming up to the idea.

The third distinction is founded on the *nature* of the two regimes, which is no doubt, unique to each. While commercial arbitrations mainly deal with the breach of commercial contracts by one of the parties, investment ones concern themselves with the violation, by one of the wings of the government, of international law commitments under investment protection provisions of a treaty.[16] It should probably be mentioned that the ICSID convention is not an "investment protection" treaty, in the sense that it does not provide for standards like the FET[17] (Fair and Equitable Treatment) and MFN[18] (Most Favored Nation) obligations, in the way that BITs (Bilateral Investment Treaties) do. In this sense, the UNCITRAL seems to have more significance for commercial arbitration, as opposed to its counterpart in investment arbitration.

The next distinction is a significant one and shall be discussed in Part III as well. It relates to the applicable law in commercial arbitrations as opposed to investment

15 Sulamerica CIA Nacional de Seguros SA and others v. Enesa Engenharia SA and others, (2012) EWCA Civ. 638; Wah and others v. Grant Thornton and others (2013) 1 Lloyds Rep. 11; Emirates Trading Agency LLC v. Prime Mineral Exports Private Limited (2014) EWHC 2104 (Comm.); International Research Corp PLC v. Lufthansa Systems Asia Pacific Pte Ltd and another, (2012) SGHC 226.

16 Blackaby (2006), p. 221

17 See generally: Kenneth J. Vandevelde, A Unified Theory of Fair and Equitable Treatment, 43 International law and Politics, pp. 44-106

18 See generally: Tony Cole, The Boundaries of Most Favored Nation Treatment in International Investment Law, (2012) Michigan Journal of International Law, Vol. 33 537-586

ones. In the former, the 'choice of law' (or "governing law") clause, *chosen by the disputing parties*, decides the law to be applied in order to resolve the dispute existing between them. The latter is subject to the principles of the VCLT (Vienna Convention on the Law of Treaties) and of public international law in general. The VCLT forms a common guiding principle for interpretation in all investment disputes. It must be remembered that there is a fundamental distinction in treaty interpretation, as envisioned under investment arbitration, as opposed to interpretation of contractual obligations under commercial arbitration. In this regard, it would be apt to reproduce the following two significant excerpts from the 2002 *Vivendi* decision:

"*In accordance with this general principle (which is undoubtedly declaratory of general international law), whether there has been a breach of the BIT and whether there has been a breach of contract are different questions.*"[19]

"A treaty cause of action is not the same as a contractual cause of action; it requires a clear showing of conduct which is in the circumstances contrary to the relevant treaty standard."[20]

More specifically, Article 42 of the ICSID Convention refers the parties back to the municipal law of the *state of the investment* where there is no contrary agreement. It is to be remembered that the ICSID's original purpose was to provide for "contractual" dispute resolution in "state contracts". This makes sense with respect to the requirement of an "open offer" by the sovereign state in order to initiate investment arbitration. The problem of course, is that municipal laws simply do not provide rules for deciding investment disputes.[21] There have also been cases that warn against an overly strict application of international law.[22] Thus, it can be seen

19 Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic, ICSID Case no. ARB/03/19, Decision on Annulment, 3 July 2002, available at: http://www.italaw.com/sites/default/files/case-documents/ita0210.pdf [hereinafter "Vivendi (2002)"], paragraph 96

20 Vivendi (2002), paragraph 113

21 See: LESI DIPENTA v. Algeria, ICSID Case no. ARB/03/08, Decision on jurisdiction, 10 January 2005, paragraph 24, available at: http://www.italaw.com/cases/323; MTD v. Chile, ICSID Case no. ARB/01/07, Award, 25 May 2004, paragraph 87, available at: http://opil.ouplaw.com/view/10.1093/law:iic/175-2005.case.1/IIC175(2005)D.pdf

22 SGS v. Philippines, ICSID Case no. ARB/02/06, Decision on jurisdiction, 29 April 2004, paragraphs 126-128

that applicable law in commercial arbitrations is more rooted in the ideology of party autonomy, whereas in investment disputes it is basically a treaty-mandated selection.
The fifth distinction concerns itself with the participation of sovereign states and 3rd parties in the dispute process. Though the former is a *sine quo non* in investment arbitrations, it is becoming fairly common in commercial arbitrations as well. It is to be noted that even when a state engages in commercial disputes, it is acting in sovereign commercial capacity (*jure gestionis).* On the point of 3rd part participation, it is to be noted that both UNCITRAL[23] and ICSID cases[24] recognize its compatibility with their respective regimes. This proves that both the regimes are equally open to participative dispute settlement.
The sixth distinction is with regard to the how the two regimes interact with transparency requirements. As is the case, the impact of investment arbitration decisions is quite high, thereby necessitating greater transparency. This is because they have the ability to curtail the sovereign regulating powers of a state. Needless to say, this has severe implications.[25] In line with the same, the ICSID requires publication on its website of cases (and interested parties) along with the major procedural steps involved. On the other hand, there is a presumption in commercial arbitrations that confidentiality, between the parties and regarding the proceedings, reigns supreme. However, some commentators have argued otherwise.[26] It is apt to succinctly note that there is no requirement for public hearing under either the ICSID Convention or the UNCITRAL rules, a feature now reserved for BITs. It would be rare to have this situation in commercial arbitration in any case, where private interests are at issue. This shows that the ICSID has taken up the mantle to take care of transparency issues, which are an inherent feature of its regime. On the

23 Supra note 10 at paragraph 1, available at: http://www.italaw.com/cases/documents/1019
24 Vivendi (2002), Order in response to Petition for Transparency & Participation as Amicus Curiae, 19 May 2005.
25 See generally: S. D. Myers v. Canada (2000) 40 ILM 1408; Lise Johnson & Oleksandr Volkov, State Liability for Regulatory Change: How International Investment Rules are Overriding Domestic Law, available at: http://www.iisd.org/itn/2014/01/06/state-liability-for-regulatory-change-how-international-investment-rules-are-overriding-domestic-law/#_ftn2
26 Alan Redfern, Martin J. Hunter, Nigel Blackaby and Constantine Perteridis, Law and Practice of International Commercial Arbitration, 4th Edition, Sweet & Maxwell Publishing (2004), pp. 27-34 as seen in Blackaby (2006)

other hand, due to the nature of the dispute involved, the UNCITRAL rules have not had to provide for the same.

The penultimate difference deals with the importance that the two regimes attribute to the *lex arbitri.* For commercial arbitrations, it obviously plays a pivotal role in challenging arbitral proceedings.[27] The basic approach under the UNCITRAL system is that the *lex arbitri,* the law applicable to the arbitration will be the law of the place where the arbitration takes place (*lex loci arbitri).*[28]Selection of a "seat" often leads to the arbitration being conducted in accordance with the laws of that country. However, the ICSID reduces *lex arbitri* to a secondary position in favor of a "self-contained system of international justice" where national courts of the place of arbitration have no "traditional role" in supervising the proceedings.[29] In this regard, Article 26 of the Convention provides:

"Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention."[30]

Further, Article 52 requires that annulment of awards must also be within the system.[31] It is worthwhile to note that this leads to an associated problem since it leads to third states siting to adjudicate a dispute that would exonerate or condemn another state to arbitration. Even though the scope of review is limited this aspect still has massive consequences. For example in the famous case of *Metaclad* v. *Mexico,* the Supreme Court of British Columbia in a decision from 2001 partially set aside an award in favor of the claimant.[32] Also, in the *Occidental* case, the English Court of Appeals confirmed an earlier decision, again having huge geopolitical

27 Article 1(2), UNCITRAL Rules

28 Alastair Henderson, Lex Arbitri, Procedural Law and the Seat of the Arbitration, (2014) 26 SAcLJ, p. 890: http://www.sal.org.sg/digitallibrary/Lists/SAL%20Journal/Attachments/703/(2014)%2026%20SAcLJ%20886-910%20(Lex%20Arbitri%20-%20Alastair%20Henderson).pdf

29 Blackaby (2006), p. 230

30 Article 26, ICSID Convention

31 Article 52, ICSID Convention

32 Metaclad v. Mexico, (2001) BCSC 664

consequences.[33] This has lead to some calls for an amendment to the ICSID regarding the same.[34]

The final difference between investment and commercial arbitration is based in, what has been described as, "international legal effect". Blackaby explains that there is a difference in the enforcement stage for the two systems. In commercial arbitrations, a successful party can invoke the New York Convention of 1958 for enforcement of an award.[35] If the other disputing party were to object, Article V of the Convention would come into play. Failure to comply with the execution of the award would be a breach of the state's international obligations under the Convention. On the other hand, investment arbitrations provide for a narrower scope of review. The award is to be executed "without further analysis by domestic judiciary".[36] Thus a failure to execute the award would automatically become a breach of international obligations.[37] He concludes on this point by noting that this breach has severe consequences including diplomatic strain.[38]

After providing thorough analysis on both the regimes, Blackaby concludes that the two classes of arbitration are indeed very different. He underscores the public nature of investment arbitrations *vis-à-vis* the essentially private nature of commercial arbitrations. This distinction, in his opinion, is the main cause for differentiation since it has different implication on both regimes with respect to public transparency and accountability. He warns against importing concepts from one into the other, so as to prevent sacrificing of the proverbial dolphin.[39] This could perhaps be the basis for arguing against importing the idea of UNCITRAL's "model law" into the ICSID framework.

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33 Occidental v. Ecuador (2005) EWCA Civ. 1116, available at: http://www.italaw.com/cases/767

34 Supra note 26

35 "New York Convention", Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 7 ILM 1046 (1968)

36 Article 53 & 54, ICSID Convention

37 For an opposing point of view, see: A. Reinisch, Enforcement of Investment Awards, in: Arbitration under International Investment Agreements (K. Yannaca-Small ed., 2010), p. 671-697 as seen in Schreuer (2010)

38 For example: the "Hickenlooper Amendment" in the United States, which provides for blocking of financial aid to any country that expropriates American property without just compensation. See, generally: http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=6513&context=penn_law_review

39 Blackaby (2006), p. 233

i. What the fish? : Investment arbitrations under UNCITRAL Rules

Though seemingly provocative, the above title aptly depicts the irony of the following short discussion. After extensive elaboration on the distinction between investment and commercial arbitrations, an uneasy truth of the investment law world must be acknowledged. In order to prevent confusion, it bears note that arbitration, at least under International Investment Agreement (IIAs), may proceed under the ICSID Convention (along with the ICSID Arbitration Rules) *or through ad hoc tribunals set up under the UNCITRAL Arbitration Rules (most notably, under the UNCITRAL Model Law rules).*[40]

To be sure, these two sub-sets of investment arbitration are also quite unlike, at least from a procedural standpoint. It is noted that they represent "two ends of the spectrum" in terms of the procedural options available to disputing parties.[41] The ICSID Convention and ICSID Arbitration Rules govern the former and there is no application of national domestic law. On the other hand, the procedural terms in the latter are governed by UNCITRAL rules. Also, unlike the UNCITRAL arbitrations, the ICSID Convention arbitrations are institutionalized in the sense that they have an administering body i.e. the ICSID Secretariat.[42]

This is known as "administered" arbitration; where this body provides administrative services to the disputants for a non-negotiable fee.[43] It has been noted with concern that review by domestic courts, in cases where the UNCITRAL rules are applicable, leads to "dilution" in international investment law and practice.[44]

40 Karl Sauvant, Yearbook on International Investment Law & Policy 2009-2010, p. 342, available at: https://books.google.co.in/books?id=vuxMAgAAQBAJ&pg=PA342&lpg=PA342&dq=ICSID+convention+as+model+law+for+investment+arbitrations&source=bl&ots=-3ZQc2jOgU&sig=Hyq1tud8hAHuOCUiWUU3Aso6dQ8&hl=en&sa=X&ved=0CDoQ6AEwBmoVChMItPXH4uzNxwIVy1gsCh3p2wW4#v=onepage&q=ICSID%20convention%20as%20model%20law%20for%20investment%20arbitrations&f=falsev [hereinafter referred to as "Sauvant (2010)"]

41 Sauvant (2010)

42 R. Doak Bishop, James Crawford & W. Michael Resiman, Foreign Investment Disputes: Cases, materials and commentary (The Hague: Kluwer International, 2005), p. 435 (citing examples of other "administered" arbitrations like ICC and LCIA arbitrations), as seen in Sauvant (2012)

43 ICSID Schedule of Fees, issued pursuant to ICSID Regulation 16 on July 6 2005, as seen in Sauvant (2010)

44 Trakman (2012), p. 605

As may be slightly evident by now, this section has gone beyond the intended scope of merely providing a context to the question of having the ICSID Convention as a "model law" for investment arbitrations. It has also discussed the nuances of the two types of arbitration: commercial and investment-centric. But it must be remembered that the primary aim in this work is to access whether a concept from the former can find application in a prominent instrument of the latter.

The anatomy of a "Model" Law: Is it just an abstraction?

In my opinion, the concept of a model law is a mere idea. There are no legal qualifications, as such, that an international instrument must fulfill in order to be classified as a model law.[45] Thus, the original question has been engaged using logic rather than legal precedent. Though a possibly unorthodox approach, the approach followed in this work seeks to delve deep into the concept of "model" laws and hopefully will be successful in concluding our inquiry.

The issue of whether a particular instrument, in any given field of international law, is suited to be labeled as a "model" for the entire regime can be viewed in two ways. The first would require us to statistically judge the success or failure of a particular instrument in terms of adoption by member countries. This would show, empirically, that a certain number of countries have chosen to adopt the model endorsed by the instrument and agreed to the conditions mentioned under it – thereby giving it the status of a successful model. This, pseudo "critical-mass" approach,[46] to use phraseology from trade law, would prove that that instrument *has become* a model for all these countries.[47]

But at best, this approach would help us answer only the inquiry of *is* the ICSID Convention a model law for investment arbitration. The task at hand, however, seems to improve a deeper investigation – *can* the ICSID Convention be a model

45 Admittedly, none could be found in this study.

46 See generally: P. Gallagher and A. Stoler, Critical Mass As An Alternative Framework For Multilateral Trade Negotiations, 15 Global Governance, Issue 3 (2009), p. 383 as seen in ICTSD: The Future and the WTO: Confronting the Challenges. A Collection of Short Essays; ICTSD Programme on Global Economic Policy and Institutions, Geneva, Switzerland (2012) www.ictsd.org

47 Of course the idea of "critical mass" is slightly different; which proposes that a certain number of countries simultaneously undertaking trade liberalization is required for the success of any trade agreement.

law for dispute resolution in investment matters. Thus the mission of this work is to identify whether, *characteristically*, the ICSID Convention has suitable features to be a model law of investment dispute settlement.

This is why a second approach must be undertaken to tackle the problem. This approach endorses an inquisition into whether that instrument serves a certain set of basic purposes that one would expect a model law to fulfill. The latter approach is adopted in this study. In order to identify these "basic purposes" that a model law should have, we begin our examination of the UNCITRAL rules.

- *What makes the UNCITRAL Model Law so "model"?*

Often the best way to approach an inquiry is through a historic prism. Before formulating the rules, the UNCITRAL had intended to merely adopt a protocol to supplement and clarify the New York Convention of 1958. But instead it decided to adopt a full-fledged model law so as *serve as a basis for national arbitration laws*.[48] This identifies the first important aspect of a model law – that it should be intended to, and have the effect of, influencing the domestic legislation of members with respect to that area of law. This makes sense when one considers that the very idea of having a model law, logically, is to provide a reference point for the countries that sign up to its adoption. That must be the primary, all-pervasive purpose of a "model" law.

Apart from this, Hollering mentions that the UNICTRAL rules were intended to *harmonize and promote uniformity in the practice of international commercial arbitration*.[49] As mentioned in the UN General Assembly Resolution from 1985, all member states were under an obligation to give due recognition to the rules to achieve "uniformity of the law of arbitral proceedings".[50]

It also mentions that they were designed to address the "specific needs of commercial arbitrations."[51] As always, there is the proverbial distinction of substantive and procedural uniformity. The former relates to the adoption of a largely uniform legal regime for arbitration in domestic legislations. The latter relates

48 UNCITRAL, Report of the Secretary General, UND A/C/N/127 (1977), p. 1-3

49 Michael F. Hoellering, The UNCITRAL Model Law on International Commercial Arbitration, The International Lawyer Vol. 20, No. 1 (Winter 1986), p. 327

50 UN General Assembly Resolution, 40/71, 1985

51 Id.

to the usage of law in arbitral proceedings. This identifies the second important aspect – that a model law should promote uniformity in the practice of its field. A model law must contribute to the reduction in fragmentation of its field, resulting from varied perceptions of the correct position of law. Though such fragmentation is quite common in the international scenario,[52] a model law should seek to address this problem by acting as a unifying agent.

Another significant import of the UNCITRAL rules was that it freed the question of arbitral law from the grasp of legislation from any one particular country. Closely related to the fourth aspect, this feature of the rules sought to remedy a problem peculiar to the field of commercial arbitration, that of multiple (and differing) domestic laws on the subject. By providing the world a "model" for the question of which law is to be applied, the rules ensured that the applicable law would not be restricted to one nation's domestic law. Thus, a model law may be one that has the features of affecting positive change in the regime it finds itself in, possibly by alleviating issues characteristic of the regime.

This brings us to the fourth, and extremely significant aspect of *applicable law*. In essence, the UNCITRAL rules provide a framework for choosing the law to be applied for settling commercial arbitration disputes. Thus a significant aspect of a model law is that it provides for some sort of guidance on the choice of law principles to be followed in settling disputes.

Hence, four functionalities of a model law have been identified for analysis. These are: the ability to influence domestic legislation (A), the effect of promoting uniformity in practice (B) and ushering in change (C). Finally, a model law should have some bearing on deciding the applicable law in dispute settlement (D). The ICSID Convention will now be accessed with respect to this combination of four factors to find out whether it has the required characteristics or "credentials" to be a model law for investment arbitrations.

This will involve an inquiry into the nature of the convention, with special emphasis on its purposes and objectives as well as its substantive provisions. As mentioned

52 M. Sornahrajah, The International Law on Foreign Investment, 3rd Edition, (Cambridge University Press: 2010), p. xv, 31; See also: A. van Aaken, Fragmentation in International Law: The Case of International Investment Law (2008) 19 Finnish Yearbook of International Law, at 128.

earlier, there seems to be doubt whether the convention only serves to provide for dispute settlement and not with respect to requiring the modeling of national investment law. One must understand whether the ICSID even took up the responsibility of setting an example for domestic investment law.

- *Denunciations galore: ICSID's shaky situation*

To be sure, there has been some turbulence in the ICSID's universe recently with a public challenge to the institution in 2009 from the Presidents of Bolivia and Ecuador.[53] Venezuela has recently withdrawn from the Convention pursuant to an application under Article 71,[54] while countries like India and Vietnam have never been keen on acceding to it. Similarly Brazil has been left out of the ICSID fold. Though such denouncement by renegade nations has been criticized as counter-productive,[55] questions regarding its future remain unclear. On this less than optimistic note, we begin our final (and main) analysis of the possibility of an "ICSID Model Law on Investment Arbitration".

- *Answers? Or only more questions? : The curious case of IMLIA.*

Here I look at whether it would ever be possible to have an IMLIA: ICSID Model Law on Investment Arbitration.

i. Impact on domestic legislation: A Model Law must serve as a basis for domestic law

As mentioned earlier the UNCITRAL rules were accepted as a model primarily because of their intended purpose was to serve as a guidepost for domestic arbitration law in member countries. In the introductory note to the ICSID Convention, the only reference to the purpose of the convention is the following line:

53 Leon E. Trakman, The ICSID Under Siege, (2012) Cornell International Law Journal, Vol. 45, pp. 603- 665, available at: http://www.lawschool.cornell.edu/research/ILJ/upload/Trakman-final.pdf [hereinafter referred to as "Trakman (2012)"]

54 Luis Britta Garcia, We have to get out of the ICSID, VENEZUELANALYSIS.COM(Jan. 24, 2012), http://venezuelanalysis.com/analysis/6766 , as seen in Trackman (2012)

55 See, generally: Diana Marie Wick, The Counter-productivity of ICSID Denounciation and Proposals for Change, The Journal of International Business and Law, available at: http://www.law.yale.edu/documents/pdf/11JIntlBusL239.pdf

"In accordance with the provisions of the Convention, *ICSID provides facilities for conciliation and arbitration of investment disputes* between Contracting States and nationals of other Contracting States. [Emphasis added]"[56]

Further, recitals two, four, five and six of the Preamble to the Convention exclusively deal with dispute resolution mechanisms. Relevant excerpts are as follows:

"Bearing in mind the possibility that from time to time disputes may arise in connection with such investment between Contracting States and nationals of other Contracting States"[57]

"Attaching particular importance to the availability of facilities for international conciliation or arbitration to which Contracting States and nationals of other Contracting States may submit such disputes if they so desire;"[58]

"Desiring to establish such facilities under the auspices of the International Bank for Reconstruction and Development;"[59]

"Recognizing that mutual consent by the parties to submit such disputes to conciliation or to arbitration through such facilities constitutes a binding agreement which requires in particular that due consideration be given to any recommendation of conciliators, and that any arbitral award be complied with;"[60]

The primary objective of the ICSID, as can be identified from the above excerpts, is to facilitate dispute settlement in investment matters. Stretched to its maximum, the objective could be stated to be the furtherance of global economic development, which it achieves by promoting the foreign investment from developed to developing nations.[61]

Thus it can be seen that, intentionally or otherwise, the ICSID Convention does not provide guiding principles for domestic investment law. It is all-together another

56 Introduction, UNCITRAL Rules, p. 5; "in submitting the Attached Convention to governments, the Executive Directors are prompted by the desire to strengthen the partnership between countries in the cause of economic development. The creation of an institution designed to facilitate the settlement of disputes between States and foreign investors can be a major step toward promoting an atmosphere of mutual confidence and thus stimulating a larger flow of private international capital into those countries which wish to attract it", as seen in Nasrullah (2012), p. 89 (See infra note 63)

57 Preamble, UNCITRAL Rules, p. 11, Recital two

58 Preamble, UNCITRAL Rules, p. 11, Recital four

59 Preamble, UNCITRAL Rules, p. 11, Recital five

60 Preamble, UNCITRAL Rules, p. 11, Recital six

61 Nasrullah (2012), p. 89

matter that ICSID cases, decided under the Convention, have the impact of restricting member's ability to make certain kinds of law. In that sense, ICSID *law,* so to speak,may influence domestic investment law, but the ICSID *Convention* does not.

ii. Promoting uniformity:

The Preamble, in its very first recital, mentions:
"Considering the need for international cooperation for economic development, and the role of private international investment therein."[62]
However, as discussed above, the intended role of the ICSID could be said to be the promotion of overall economic development around the world. In this regard, by providing for a comprehensive system of dispute resolution, it provides for a more suitable environment for potential investors. This is achieved by a body of ICSID law, emanating out of case laws, which seeks to establish a model of international investment that is stable, relatively risk-free and at the same time provides for effective resolution of disputes. In this sense, the ICSID does promote uniformity in the field of international investment law.

iii. Ushering in positive change

UNCITRAL's success in solving the problems inherent in commercial arbitrations has been discussed.[63] The ICSID also provides for a gamut of solutions for the problems plaguing investment arbitrations.
ICSID cases[64] have provided that where consent has been given to investor-state arbitration, there is no need to exhaust local remedies even though Article 26 provides that States *can* mandate it as a requirement.[65] This improves on the situation since it prevents the States from establishing hurdles in the institution of investment cases against itself.

62 Preamble, UNCITRAL Rules, p. 11, Recital one
63 See Part III (i).
64 Helnan v. Egypt, Decision on Annulment, 14 June 2010, paragraphs 9, 28-57 as seen in Christoph Schreuer, Interaction of International Tribunals and Domestic Courts in Investment Law, Contemporary Issues in International Arbitration and Mediation, p. 73 [hereinafter referred to as "Schreuer (2010)"]
65 Article 26, ICSID Convention

It is to be noted with concern however, that this is again ICSID *law* (in terms of case law) that provides the positive change, whereas the Convention itself seems slightly restrictive in light of Article 26.

Another significant import of the ICSID Convention is that its regime is largely free from the "north-bias" school of criticism.[66] This feature was beginning to become a serious trend in several other arbitrations and the Convention was instrumental in providing neutral adjudication in investment disputes. Commentators believe that this has been a key element in the success of the regime as a whole. [67] Though the Convention has been found to exhibit a careful balance of rights between the investor and the State, it has been noted that "mending and correction" must be a continual exercise.[68] The procedural elements of this balance has been described as follows:

"The procedural arrangements made for this purpose include mainly the equal voting right of the participating state representative, renunciation of the right of diplomatic protection, investor's right to direct access to the arbitral forum, consent based jurisdiction, application of the law, formation of the arbitrators and the enforcement of arbitral award."[69]

Not to mention, the ICISD convention protects the rights of the parties by providing for interim measures under Article 47. To this extent, it can be said that for the investment dispute settlement the ICSID does usher in positive change.

iv. The ICSID Convention and Applicable Law

With regard to applicable law, the Preamble mentions:

66 For an opposing view, see generally: Steve Josselon, Pro-North Bias Seen at ICSID, available at: Steve Josselen, http://tinyurl.com/4g2557 (" [ICSID] is biased toward corporations based in Developed World."); also Christian Teitje et al., Once and forever ? The Legal Effects of Denunciation of ICSID, (2008) 6 Transnational Disp. MGMT, 1 at 5, as seen in Nasrullah (2012), p. 91

67 Dr. K.V.S.K. Nathan, ICSID Convention: The Law of International Centre for Settlement of Investment Dispute, 1st ed. (JP Juris, New York, 2000) at 51 as seen in Nakib Nasrullah, FDI Related Dispute Settlement and the Role of the ICSID: Striking balance between Developed and Developing Economies, The International Law Annual (2013), available at: http://www.spilmumbai.com/uploads/article/pdf/fdi-related-dispute-settlement-and-the-role-of-icsid-striking-balance-between-de-22.pdf [hereinafter referred to as "Nasrullah (2013)"]

68 Nasrullah (2013), p. 88

69 Nasrullah (2013), p. 89

"Recognizing that while such disputes would usually be subject to national legal processes, international methods of settlement may be appropriate in certain case"[70]
Though the general principle in investment arbitrations is that the parties are free to choose the specific law to be applied to their disputes. However, and as mentioned earlier, if the parties do not make this choice of law, the ICSID convention provides for the application of the law of the Contracting state party to the dispute and 'such rules of international law as may be applicable'.[71]The "Contracting state party" has, unsurprisingly, been interpreted to mean the host state. However, it must be remembered that domestic law applies only in conjunction with the rules of international law. In case of a conflict between the two, the latter will prevail.[72] The ICSID tribunal may also, as provided in Article 42(3), decide a case *ex aequo at bono* if the parties agree to do so. The usefulness of this has, however, been debated.[73] A finding of *non liquet* by the tribunal is prohibited.[74]
To this end, it can be said that the ICSID Convention does have a robust mechanism in place for deciding applicable law.

Conclusion: Even Einstein asked Questions

I began this work with a whole range of questions, which all sprang from the initially proposed question. In order to understand whether the ICSID Convention could operate as a model law in the field of investment arbitrations, a detailed study was required of the UNCITRAL, the ICSID, investment and commercial arbitrations in general and the nuances arising within them. All of the above has been done in Parts I & II. Part III addresses the inquiry at hand head-on and took on a completely ingenious approach. Through and through, the importance of asking questions, the right kind and the right amount, has been paramount.
In conclusion, the ICSID Convention was found to be largely conducive to the status of a "model law" having fulfilled three out of the four criteria laid out in this

70 Preamble, UNCITRAL Rules, p. 11, Recital three
71 Article 42(1), ICSID Convention
72 Amco Asia Corporation et al v. Republic of Indonesia, 1986, 25 I.L.M 1439, as seen in Nasrullah (2013), p. 92
73 Taslim Olawale Elias, The International Court of Justice and Some Contemporary Problems, 1st ed. (Martinus Nijh off, the Hague, 1983) at 14, as seen in Narullah (2012), p. 92
74 UNCTAD, Chapter 2.6: Applicable Law (2003), UNCTAD/EDM/Misc.232/Add.5, available at: http://unctad.org/en/docs/edmmisc232add5_en.pdf

work. The desirability of the same, with respect to the dangers of excessive interaction as discussed, however continues to be disputed.