INTERNATIONAL EXPERIENCE OF JOINING THE ICSID CONVENTION
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1. EXECUTIVE SUMMARY

This report is intended to assist Vietnam to assess the advantages and disadvantages of becoming a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention). The focus of this report is an examination of the experience of Indonesia and the Philippines as parties to ICSID. The specific objectives of this report are to examine:

(i) Overall impact of joining ICSID on the investment climate, economy and legal framework of Indonesia and the Philippines;

(ii) Potential opportunities and risks facing Indonesia and the Philippines as a party to investor-state disputes settled through the ICSID dispute settlement mechanism in comparison with non-ICSID rules;

(iii) Measures utilized by Indonesia and the Philippines to mitigate the risks when joining ICSID and later, in utilizing ICSID as a dispute settlement mechanism; and

(iv) Lessons learned and implications for Vietnam when joining ICSID.

This report was informed by comments, suggestions and exchanges between the author and various stakeholders, in particular during the workshop organized for this purpose on 8 September 2016 in Hanoi. The report also benefited from discussions with various stakeholders including Government officials, academics and private practitioners.

This report draws on, and is intended to be read together with, the previous report prepared for this project, dated 12 August 2016, which examined the advantages and disadvantages of the ICSID Arbitration Rules in comparison with other arbitral rules used in investor-State dispute settlement (ISDS) proceedings.

Overall impact of joining ICSID

There do not seem to be any studies examining the impact of joining ICSID on the economy of members. There are a number of studies which have examined the broader question of whether signing up to investment agreements and ISDS increases FDI, however the results of these studies have been conflicting. Indonesia joined ICSID in 1968 and the Philippines joined in 1978. In both countries there have been very significant political, social and economic changes over the last four or five decades. It would be difficult to try to identify the impact of joining ICSID on the investment framework and economy of Indonesia and the Philippines over this period. While investment agreements, and ICSID membership, are part of the policy framework for attracting investment other host country determinants, in particular economic factors, play a more powerful role.
ICSID disputes experience of Indonesia and the Philippines

Both Indonesia and the Philippines have relatively limited experience of arbitration under ICSID Rules, and indeed of ISDS more generally. There are only three disputes against Indonesia and the Philippines which have proceeded to a final award. Many of the issues or concerns raised by the cases brought against Indonesia and the Philippines are relevant to the system of ISDS and investment agreements more generally, rather than being specific to ICSID. There are however some aspects of these countries’ experience which demonstrate some of the opportunities and risks of international arbitration under ICSID Rules, in particular in relation to the unique ICSID provisions on jurisdiction, preliminary objections, and annulment of awards. Neither Indonesia nor the Philippines have experience enforcing ICSID awards. There have been no ICSID cases which have resulted in a finding against the Philippines, and only one ICSID case which has resulted in a finding against Indonesia.

Measures to mitigate the risks of ICSID

At the time of joining ICSID, neither Indonesia (in 1968), nor the Philippines (in 1978) took any specific action to mitigate any perceived risks associated with joining ICSID. In recent years both Indonesia and the Philippines have taken action to address some concerns related to ISDS and ICSID, either through their treaty practice, or through notifications under Article 25(4) of the ICSID Convention. Note that while Indonesia is seeking to terminate / renegotiate its older investment treaties and the Philippines has withheld consent to arbitration under ICSID Rules in recent agreements, neither country has sought to withdraw from ICSID.

Lessons learned

- The experience of Indonesia and the Philippines (and the evidence more broadly) suggests that Vietnam is unlikely to see a direct increase in FDI or other direct economic impacts as a result of joining ICSID.
- The fact that both Indonesia and the Philippines have faced relatively few ICSID disputes even though both are significant recipients of foreign investment and have large networks of investment treaties suggests that joining ICSID will not, in itself, lead to increased ISDS disputes.
- The experience of Indonesia and the Philippines suggest that the outcomes of most of their disputes would not be substantially different whether under ICSID or non-ICSID Rules. However, the cases do demonstrate some of the particular advantages and disadvantages in relation to the unique ICSID provisions on jurisdiction, preliminary objections, and annulment of awards.
- The experience and actions of Indonesia and the Philippines since joining ICSID demonstrate the importance of addressing any concerns related to ICSID at the time of joining.
2. OVERALL IMPACT OF JOINING ICSID

2.1 Impact of Investment Agreements

A broad objective of ICSID is to encourage a larger flow of private investment.¹ This raises the question of whether there is any evidence that ICSID has succeeded in generating increased foreign direct investment (FDI).

_Literature review_

From a review of the literature the author has not identified any studies focusing on the specific question of whether joining ICSID generates increased FDI or other economic benefits. There have however been a significant number of studies focusing on the broader questions of whether agreeing to BITs or ISDS generates increased FDI. In short, these studies have reached conflicting conclusions on the relationship between BITs and FDI.² Some studies have found a strong relationship, some a weak relationship, and some no relationship. We will provide an overview of some of the key findings in some of these studies below.

An early 1998 study by UNCTAD analyzed data on bilateral FDI flows – three years prior to and three years after the conclusion of a BIT – for 200 BITs concluded between 1971–1994 and did not find an impact. The study did find a (weak) correlation between the amount of FDI and the number of BITs which a country was party to.³

Hallward-Driemeier (2003)⁴ analyzed the impact of BITs on FDI by looking at a sample of bilateral FDI flows from 20 OECD countries to 31 developing countries over the period 1980 to 2000. This study concluded that BITs do not serve to attract additional FDI.

Tobin and Rose-Ackerman (2003)⁵ concluded that the number of BITs has little impact on a country’s ability to attract FDI. However, they did find a relationship between the conclusion of BITs, on the one hand, and the level of political risk. They found that countries that are relatively risky seem to be able to attract somewhat more FDI by signing BITs.

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² See for example, UNCTAD The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries 2009 (UNCTAD 2009); Lisa Sachs and Karl P. Sauvant, “BITs, DTTs and FDI flows: an overview” in Karl Sauvant & Lisa Sachs (Eds.) The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows Oxford University Press, 2009 (Sauvant & Sachs 2009), Chapter 1.
Egger and Pfaffermayr (2004)\textsuperscript{6} analyzed the effect of implementing a new BIT on bilateral outward FDI stocks. The study found that BITs exert a positive and significant effect on outward FDI of home countries in BIT partner host countries.

In the most positive study Neumayer and Spess (2005)\textsuperscript{7} examined the relationship between the number of BITs and overall FDI. They found a positive effect of BITs on FDI inflows and that developing countries that sign more BITs with developed countries receive more FDI.

Aisbett (2007)\textsuperscript{8} examined FDI flows from 29 OECD countries to 28 host developing countries during 1980–1999, examining the direct impact of BITs on FDI from developed to developing partner countries. The study found a positive and strong correlation between BIT ratification and FDI inflows, similar to that found by Neumayer and Spess. However, using a more sophisticated approach, Aisbett’s study suggests that rather than the increased FDI being caused by the conclusion of BITs, the reverse may be true – that is, higher amounts of FDI between partners may lead to the conclusion of BITs.

Yackee (2007)\textsuperscript{9} examined the impact of BITs on FDI in response to the study by Neumayer and Spess. Yackee used the same methodology, but made several small changes and concluded that after these changes the apparently positive effect of BITs on FDI found by Neumayer and Spess falls away.

In summary, there is no clear answer on whether signing up to BITs increases FDI. Recent studies – including by Aisbett and Yackee – cast doubt on some of the earlier studies which reached positive conclusions.

**Determinants of investment**

Perhaps it should not be surprising that there is no clear evidence that signing up to BITs leads to increased FDI. UNCATD states that the determinants of FDI consist of:

(a) the general policy framework for foreign investment, including economic, political and social stability, legislation affecting foreign investment and any other policies affecting FDI;
(b) economic determinants, such as market size, cost of resources and other inputs or the availability of natural resources; and
(c) business facilitation, including investment promotion.\textsuperscript{10}

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\textsuperscript{10} UNCTAD 2009, p.110; see also Sachs & Sauvant 2009.
Investment agreements are part of the policy framework for attracting investment but a BIT could never be a sufficient policy instrument to attract FDI. As UNCTAD states, other host country determinants, in particular economic determinants, play a more powerful role.  

2.2 Impact of Joining ICSID

Given the lack of clear evidence of a positive impact of signing up to BITs on FDI, it seems unlikely that there would be evidence that joining ICSID in itself would result in significant increase FDI. There do not appear to be any studies examining this specific question. In a case, such as Vietnam, where the country already has a large number of International Investment Agreements (IIA) in place which provide protection for investments, including ISDS, it would be surprising if joining ICSID would have a significant impact on FDI in itself. It would not result in additional substantive protection for investments and would not create a new mechanism to resolve disputes. It would simply provide another forum or avenue through which an investor could pursue an ISDS dispute. Joining ICSID may create some additional certainty for sophisticated investors in relation to enforcement of awards, however given the inconclusive results on the effect of BITs in general on FDI it would be surprising if this relatively specific issue would lead to an increase in FDI.

Despite the lack of evidence on the impact of joining ICSID on FDI and broader economic benefits, there is a certain signaling effect of joining ICSID. Joining ICSID could be used by a government to signal that it is open to investment, that it is committed to protecting investments, and committed to effectively settling investment disputes if they should occur. If consistent with other developments in the regulatory environment this kind of signaling could be expected to promote a more positive perception of a country as an investment destination, but it would be difficult to measure this in quantitative terms.

2.3 Impact of Joining ICSID: Indonesia & the Philippines

Following from the lack of clear evidence on the impact of signing up to BITs on FDI it would be surprising if there was any specific evidence of the impact of joining ICSID on the economies of Indonesia or the Philippines.

Indonesia joined ICSID in 1968. The Philippines joined in 1978. In both countries there have been very significant political, social and economic changes over the last four or five decades. In terms of the investment framework this has involved the progressive opening of sectors to investment and significant changes to the legislation regulating foreign investment.  

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11 UNCTAD 2009, p.110.
As outlined above, it would be very difficult to try to identify the impact of joining ICSID on the investment framework and economy of Indonesia and the Philippines over this period. The studies suggest that economic and structural factors are much more important than signing BITs or signing up to ICSID. There is a ‘signalling effect’ associated with joining ICSID referred to above. However, given the multiple and interrelated determinants of FDI it would be difficult to measure the impact of this signalling effect, and there do not seem to be any studies which have attempted to do so.

In terms of the impact of joining ICSID on the legal framework and treaty practice in each of Indonesia and the Philippines, we will examine this in Section 4.

3. ICSID DISPUTE EXPERIENCE: OPPORTUNITIES AND RISKS

3.1 ICSID dispute experience: Indonesia

There have been eight known ISDS cases against Indonesia – six of these are ICSID cases. Of these six ICSID cases, two are pending:

- Oleovest Pte. Ltd. v Indonesia\(^{13}\); and
- Churchill Mining & Planet Mining v Indonesia\(^{14}\)

Four of these six ICSID cases have been concluded:

- Newmont v Indonesia\(^{15}\) (settled)
- Rafat Ali Rizvi v Indonesia\(^{16}\) (dismissed on jurisdiction)
- Cemex v Indonesia\(^{17}\) (settled); and
- Amco v Indonesia\(^{18}\) (contract claim: award in favour of investor)

In summary, of the four concluded ICSID cases brought against Indonesia:

- Two were settled before an award: Newmont and Cemex;
- One was dismissed on jurisdiction: Rafat Ali Rizvi; and
- One involved a finding in favour of the claimant: Amco.

We will briefly review Indonesia’s ICSID cases to examine any aspects which illustrate the risks or opportunities of arbitration under ICSID Rules.

No specific implications for ICSID

One of the two pending cases: Oleovest Pte. Ltd. v Indonesia\(^{19}\) was registered very recently (in August 2016). It was brought under the Indonesia-

\(^{13}\) Oleovest Pte. Ltd. v Republic of Indonesia, ICSID Case No. ARB/16/26.
\(^{14}\) Churchill Mining & Planet Mining v Republic of Indonesia, ICSID Case No. ARB/12/14 & ARB/12/40.
\(^{15}\) Nusa Tenggara Partnership B.V. and PT Newmont Nusa Tenggara v. Republic of Indonesia, ICSID Case No. ARB/14/15.
\(^{16}\) Rafat Ali Rizvi v Republic of Indonesia, ICSID Case No. ARB/11/13.
\(^{17}\) Cemex Asia Holdings Ltd v Republic of Indonesia, ICSID Case No. ARB/04/3.
\(^{18}\) Amco Asia Corporation and others v Republic of Indonesia, ICSID Case No. ARB/81/1
\(^{19}\) Oleovest Pte. Ltd. v Republic of Indonesia, ICSID Case No. ARB/16/26.
Singapore BIT. A tribunal has not yet been established and there is little public information.

The case of Cemex v Indonesia\(^{20}\) was brought by a Singaporean investor under the ASEAN Investment Agreement. It was registered in 2004 and settled in February 2007. The claimant alleged it had been blocked from acquiring a majority shareholding in a State-owned enterprise due to political opposition. However, there is very little publicly available information about the case.

In Newmont v Indonesia\(^{21}\) the claim was brought under the Indonesia-Netherlands BIT. The claimants operate a copper and gold mine in Indonesia and the dispute concerned export restrictions and an export duty on copper. The dispute was registered in July 2014. However, in August 2014 the claimants withdrew their claim (before tribunal was constituted). There are reports that the claimant withdrew its case after it was granted an exemption from the new requirements by Indonesia.

None of the above cases raise any specific implications with regard to ICSID. There is no reason to think that they would have been substantially different if they had been submitted under other arbitral rules.

**Cases which raise some implications with regard to ICSID**

**Churchill Mining & Planet Mining v Indonesia**\(^{22}\) are claims brought under both the Australia-Indonesia BIT (Planet) & Indonesia-UK BIT (Churchill) arising out of the same events. The disputes concern the revocation of certain mining licenses. The request for arbitration was registered in December 2012, and in February 2014 the Tribunal upheld jurisdiction. There has been no hearing on the merits yet as there have been several exchanges on document production and evidence issues.

In Planet Mining, while the Tribunal found it had jurisdiction under a domestic law approval, it found that it did not have jurisdiction under the Australia-Indonesia BIT. The BIT requires that if ICSID arbitration is available (because both Australia and Indonesia are parties to ICSID) then an investor may only submit a dispute under ICSID Rules. The BIT also provides that if an investor submits a dispute to ICSID the other (State) Party “shall consent in writing within 45 days” to ICSID arbitration. However, the Tribunal found that promise to consent did not amount to automatic consent to ICSID arbitration. In this case Indonesia had not consented to ISDS at ICSID and so the Tribunal found that it had no jurisdiction under the BIT or as required under Article 25 of the ICSID Convention.\(^{23}\)

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\(^{20}\) Cemex Asia Holdings Ltd v Republic of Indonesia, ICSID Case No. ARB/04/3.

\(^{21}\) Nusa Tenggara Partnership B.V. and PT Newmont Nusa Tenggara v. Republic of Indonesia, ICSID Case No. ARB/14/15.

\(^{22}\) Churchill Mining & Planet Mining v Republic of Indonesia, ICSID Case No. ARB/12/14 & ICSID Case No. ARB/12/40.

\(^{23}\) Planet Mining v Republic of Indonesia, ICSID Case No. ARB/12/14 & ARB/12/40, Decision on Jurisdiction, 24 February 2014, para. 198.
Rafat Ali Rizvi v Indonesia\textsuperscript{24} concerned a government bailout of a bank in which the claimant held shares as well as the claimant’s conviction for fraud and money laundering. The claim was registered in May 2011, under the Indonesia – UK BIT. In 2012, the Tribunal dismissed Indonesia’s preliminary objection under ICSID Rule 41(5) that the claims were “manifestly without legal merit”. However, the Tribunal subsequently upheld Indonesia’s jurisdictional objection that the investment was not “admitted in accordance with investment law” as required under the BIT.

Rafat Ali Rizvi demonstrates the use of the ICSID Rule 41(5) process for expedited preliminary objections. This process is not available under other arbitral rules. In this case Indonesia lost its 41(5) objection – but the Tribunal still bifurcated the case and decided Indonesia’s jurisdictional objections before proceeding to the merits – and the Tribunal ultimately upheld Indonesia’s objection and dismissed the case. This case provides evidence that the use of the 41(5) procedure won’t prejudice a respondent State’s case – even if it loses on the preliminary objection.

Amco v Indonesia\textsuperscript{25} was an early ICSID case brought under a contract, not under a treaty. The request for arbitration was registered in 1981 and the dispute arose from an agreement for the construction and management of a hotel in Jakarta after the Government effectively took over the management of the hotel. In 1984, the Tribunal issued an award in favour of the claimants. In 1985, Indonesia sought annulment of the award and the award was annulled (in part) in 1986. In 1987, the claimant re-submitted the dispute to a new Tribunal and a second award was issued in 1990 – again in favour of the claimants. The claimant then sought Supplemental Decisions and Rectification of the second award. Following this decision in October 1990, both parties requested annulment of the second award. These applications for annulment were rejected in December 1992.\textsuperscript{26}

The Amco case – primarily the first annulment decision – generated concerns about the ICSID annulment mechanism. It is one of the few ICSID cases involving both two awards and two annulment proceedings. The first annulment committee found the first Tribunal had manifestly exceeded its powers as it had failed to apply the relevant provisions of Indonesian law. The Tribunal also found that, by incorrectly calculating the investor’s equity investment (which was relevant to whether the investor had met its obligations), the Tribunal had failed to state reasons on which the award was based. These findings provoked concerns that the ad-hoc annulment committee had taken an expansive approach to annulment and had reviewed

\textsuperscript{24} Rafat Ali Rizvi v Republic of Indonesia, ICSID Case No. ARB/11/13.
\textsuperscript{25} Amco Asia Corporation and others v Republic of Indonesia, ICSID Case No. ARB/81/1
\textsuperscript{26} Amco Asia Corporation and Others v The Republic of Indonesia, Decision on Annulment of Award of 5 June 1990 and of Supplemental Award of 17 October 1990, 3 December 1992, 9 ICSID Reports 9, 34-83
the merits of the award. To some commentators the approach of the first Amco annulment committee was closer to an appeal than a review.27

In terms of specific implications for ICSID it is hard to be definitive about how the case would have proceeded if it was under non-ICSID Rules. In many jurisdictions it is possible for non-ICSID awards which have been set-aside to be resubmitted to a new tribunal, and it is also possible for such re-submitted awards to face another application to have them set-aside (before national courts). In general, however, national courts have been less prepared to review the reasoning of awards in detail than ICSID annulment committees such as the Amco committee.28 There is also no basis to set-aside a non-ICSID award on the basis that the tribunal “failed to state reasons” under UNCITRAL Model Law.

In Amco, Indonesia ultimately lost the case. As a result of its (partially successful) application for annulment, the process was longer and more expensive than it would have been otherwise. However, despite the ultimate result, the availability of the annulment process may still have been seen as positive by Indonesia. The process meant that Indonesia delayed having a binding award against it (and therefore an obligation to pay damages) for an additional 8 years. It is likely that a respondent government seeking annulment would be more concerned with a positive outcome than the specific reasoning of the annulment committee. So the concerns expressed by some commentators with respect to the decision of the first annulment committee may not have been shared by Indonesia.

3.2 ICSID dispute experience: Philippines

There have been four known ISDS disputes against the Philippines (one involving a resubmitted claim), all under ICSID Rules. Two of these cases are pending:

- Shell Philippines v Philippines29
- Baggerwerken v Philippines30

The other two cases have been concluded:

- Fraport v Philippines I & Fraport v Philippines II31 (awards in favour of State)
- SGS v Philippines32 (settled)

27 For comment, see Crawford, James “Ten Investment Arbitration Awards that Shook the World: Introduction and Overview” 4 Dispute Resolution International 71 2010.
29 Shell Philippines Exploration B.V. v Republic of the Philippines (ICSID Case No. ARB/16/22)
30 Baggerwerken v Republic of the Philippines (ICSID Case No. ARB/11/27)
31 Fraport AG v Republic of the Philippines (Fraport I) (ICSID Case No. ARB/03/25); Fraport II (ICSID Case No. ARB/11/12).
32 SGS Société Générale de Surveillance S.A. v Republic of the Philippines (ICSID Case No. ARB/02/6)
**Shell Philippines v Philippines**\(^{33}\) is a claim under the Netherlands – Philippines BIT. It was only registered in July 2016, and the tribunal has not yet been established. The dispute is reported to be with regard to a tax ruling that a project, which the investor has an interest in, owes a large amount in corporate income taxes, but there is little public available information at this stage.

The case of **Baggerwerken v Philippines**\(^{34}\) was registered under the Belgium-Luxembourg-Philippines BIT in 2011. There has been a hearing on jurisdiction and merits, but no Award has been issued yet. The dispute is reported to have arisen out of the Government’s termination of a contract for the rehabilitation of a lake.

**Fraport v Philippines**\(^{35}\) concerned a dispute under the Germany – Philippines BIT with regard to a contract between the Philippines Government and the claimant for construction and operation of passenger terminal at Manila Airport. The request for arbitration was registered by Fraport in 2003, and in 2007 the first Tribunal issued an Award dismissing the claim on jurisdictional grounds. The Tribunal found that the investment was not “in accordance with law”, as required by the BIT, as Fraport had intentionally circumvented the ‘anti-dummy law’ through secret shareholder agreements. Fraport sought annulment, and in 2010 the first annulment committee decided to annul the Award. The Committee annulled the award on the basis that there had been a serious departure from a fundamental rule of procedure (the right to be heard). The Committee found that the Tribunal based its finding on evidence submitted after the hearing had been closed without giving the parties (in particular the investor) the right to make submissions on the evidence.

In 2010, Fraport commenced a new ICSID arbitration, and in 2014 the second Tribunal again dismissed the claims on jurisdiction. The second Tribunal found that the investment was not protected by the BIT due to illegality (the breach of the ‘anti-dummy law’).

Fraport was controversial because of the use of the ICSID annulment procedure in a case where the dispute was dismissed by both the original and re-submitted tribunals on jurisdictional grounds. This meant that the Philippines was forced to defend the dispute twice in circumstances where the investment had been found to have been made illegally. The dispute raised concerns and a perception that the annulment Committee had offered ‘gratuitous advice’ and criticism of the first Tribunal’s decision (including that the interpretation of BIT was not consistent with the customary rules of treaty interpretation). The Philippines Government was very unhappy with the annulment decision in *Fraport* and wrote to ICSID expressing concerns that there was a systemic problem of ICSID Committees exceeding their power.

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\(^{33}\) *Shell Philippines Exploration B.V. v Republic of the Philippines* (ICSID Case No. ARB/16/22)

\(^{34}\) *Baggerwerken v Republic of the Philippines* (ICSID Case No. ARB/11/27)

\(^{35}\) *Fraport AG v Republic of the Philippines* (*Fraport I*) (ICSID Case No. ARB/03/25); *Fraport II* (ICSID Case No. ARB/11/12).
under the ICSID Convention. The Philippines urged ICSID to consider guidelines for Committees to ensure fair and effective proceedings.

Despite the concerns raised by Fraport, it is not clear that the result would have been substantially different under non-ICSID procedures. For jurisdictions which have adopted arbitral laws based on the UNCITRAL Model Law, there are also grounds to set-aside an award on procedural grounds, such as where a party is unable to present its case, or that the arbitral procedure is not in accordance with the agreement of the parties. It is possible that national courts may have taken a more deferential approach to reviewing the Award. However, in the abstract it is difficult to predict whether or not a specific court may have decided to set aside the Award on this basis.

**SGS v Philippines**\(^{36}\) was a dispute under the Philippines-Switzerland BIT, registered in 2002. The dispute concerned an alleged breach of contract between the investor and the Government. The claim was brought under the ‘umbrella clause’ in the BIT, which required the Parties to observe any obligation it has assumed with regard to specific investments. The claimant submitted the claim to ICSID despite an exclusive jurisdiction clause which provided that any disputes arising under the contract were to be settled by Philippine courts.

In 2004, the Tribunal issued a decision upholding jurisdiction – but also suspending proceedings as the claim was not *admissible*. The Tribunal found that the alleged breach of contract must be established by the Philippine courts (consistent with the exclusive jurisdiction clause). In 2007, the Tribunal lifted the stay of the proceedings. However, the dispute was subsequently settled in 2008 (reportedly for 150 million Swiss Francs).

The case is interesting with regard to the Tribunal’s approach to the umbrella clause, but it does not raise specific implications for ICSID and there is no suggestion that the process and outcome would have been substantially different if the dispute was submitted under non-ICSID rules.

### 3.3 ICSID dispute experience: opportunities and risks

Both Indonesia and the Philippines have relatively limited experience of arbitration under ICSID Rules, and indeed of ISDS more generally. There are only three disputes against Indonesia and the Philippines (combined), which have proceeded to a final award (although two of these disputes involved a re-submitted claim and two awards).

Many of the issues or concerns raised by the cases brought against Indonesia and the Philippines are relevant to the system of ISDS and IIAs more generally, rather than being specific to ICSID. There are, however, some aspects of these countries experience which demonstrate some of the opportunities and risks of international arbitration under ICSID Rules.

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\(^{36}\) *SGS Société Générale de Surveillance S.A. v Republic of the Philippines* (ICSID Case No. ARB/02/6)
Opportunities

The Planet Mining case demonstrates that the consent of the respondent State to ISDS is critical. This is the case under both ICSID and non-ICSID arbitration. However, for ICSID cases, consent is a jurisdictional requirement under Article 25 of the ICSID Convention.

Again, while this is not specific to ICSID arbitration, the Fraport case demonstrates that ISDS cannot be used to protect “investments” which were acquired illegally, or which do not otherwise comply with the treaty.

The Rafat Ali Rizvi case demonstrates the availability of the expedited process to decide preliminary objections against frivolous claims under ICSID Rule 41(5). Although in that case the respondent was not successful in its objection, the ability to make such an objection is valuable and there is no equivalent mechanism in other arbitral rules.

The Amco case against Indonesia demonstrates some of the advantages or opportunities related to the ICSID annulment mechanism. There is a reasonably widely held view that in some circumstances a respondent State may have be better chance to annul an award under the ICSID annulment process than it would if it was seeking to set-aside a non-ICSID award before national courts.\(^\text{37}\) In balance to this perception, there is evidence that the approach of ICSID annulment committees has become more restrictive (and less likely to annul an award) in recent years.\(^\text{38}\)

Risks

The risks of ICSID arbitration illustrated by the experience of Indonesia and Philippines are primarily related to the ICSID annulment process, and in particular the experience of the Philippines in the Fraport case. In Fraport, the Philippines was very dissatisfied with the approach of the first annulment committee, considering that it had exceeded its mandate and effectively reviewed the merits of the award. Although in both the original and resubmitted cases the claims were dismissed on jurisdictional grounds, the Philippines was forced to defend the claims before two separate tribunals. In these circumstances the Philippines’ dissatisfaction is understandable. However, it is also possible for an award to be set-aside and then the claim re-submitted to a new tribunal under non-ICSID rules, and so it is not clear that the outcome would have been substantially different if the case was litigated under non-ICSID rules.


\(^\text{38}\) Bondar Ibid., p.673; ICSID Updated Background Paper on Annulment for the Administrative Council of ICSID, May 5, 2016, p.30
4. MEASURES TO MITIGATE RISKS OF ICSID

4.1 Measures to mitigate risks of ICSID: Indonesia

4.1.1 Implementation of ICSID

The ICSID Convention entered into force for Indonesia on October 28, 1968. Pursuant to Article 69 of ICSID Convention, Indonesia has notified Law No. 5 of June 29, 1968, as the measure adopted by the State to make the ICSID Convention effective in its territory. An unofficial English translation of Law No. 5 of 1968, suggests that Indonesia has recognised the requirement in Article 54 of the ICSID Convention that an ICSID award must be enforced as if it was a final judgment of domestic courts.

Pursuant to Article 54(2) of the Convention, Indonesia has designated the Supreme Court as competent for the recognition and enforcement of ICSID awards.

Article 25(4) of the ICSID Convention allows for a State to notify ICSID of a class or classes of disputes which it would or would not consider submitting to the jurisdiction of the ICISD. At the time it joined ICSID, Indonesia did not make any notification under Article 25(4) (although it has recently done so – see further below).

In terms of the practice of enforcement in Indonesia, it does not appear that an ICSID award has been enforced or has been sought to be enforced in Indonesia. This is perhaps not surprising as Indonesia has lost just one ICSID Case: *Amco*.

4.1.2 Measures since joining ICSID

*Treaty practice*

Indonesia currently has 49 BITs signed or in force. The vast majority of these BITs provide consent to ISDS under ICSID Rules. One exception is the Australia-Indonesia BIT, which does not provide prior consent to ISDS where both Australia and Indonesia are parties to ICSID (discussed in more detail above in relation to the *Planet Mining* case in Section 3.1). However, this unusual consent clause reflects Australian practice (at the time) rather than Indonesian practice and so should not be interpreted as a response by Indonesia to joining ICSID.

Indonesia is also party to 7 other IIAs: the ASEAN Comprehensive Investment Agreement (ACIA); the Australia-New Zealand FTA (AANZFTA); the Indonesia-Japan FTA; the ASEAN Investment Agreements with China, India and Korea; and the Organisation of the Islamic Conference (OIC) Investment Agreement. Each of these IIAs include ISDS. All (except for the OIC

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Agreement) include consent to arbitration under ICSID Rules. The treaties do not contain any express limitations specific to ICSID.

In 2014, it was widely reported that Indonesia had decided to terminate all of its existing BITs.\(^{40}\) The clearest government articulation of Indonesia’s approach at the time was provided by Indonesia’s Ambassador to Belgium who stated that Indonesia was not seeking to terminate all BITs unilaterally at once, but intended to discontinue BITs in accordance with their terms. He stated that Indonesia was seeking to modernise its BITs to make them fairer and more reciprocal in nature.\(^{41}\) Since 2014, Indonesia has been actively pursuing this agenda and has unilaterally terminated 18 BITs.\(^{42}\) Indonesia’s new approach to BITs and ISDS is controversial and reflects concerns with regard to the system of ISDS. It does not, however, appear to be a specific response to concerns with ICSID. Indonesia’s concerns are more generally with regard to older-style BITs and the system of ISDS rather than any specific forum. In this respect, Indonesia has not taken steps to withdraw from ICSID.

*Article 25(4) Notifications*

Article 25(4) of the ICSID Convention allows for a State to notify ICSID of a class or classes of disputes which it would or would not consider submitting to the jurisdiction of the ICSID.

In September 2012, Indonesia notified that it would not consider submitting to the jurisdiction of ICSID disputes arising from administrative decisions issued by the Regency Governments within Indonesia. This appears to be a response to concerns raised by the *Planet Mining* and *Churchill Mining* cases. The effect of this notification in relation to Indonesia’s IIAs is not entirely clear. Where existing IIAs contain consent to ISDS at ICSID, which is not limited in this way, the notification Indonesia made in 2012 would not likely be characterised as limiting this broad consent.\(^{43}\) It is of course open to Indonesia to carve-out disputes arising from administrative decisions issued by the Regency Governments in *future* treaties.

### 4.2 Measures to mitigate risks of ICSID: Philippines

#### 4.2.1 Implementation of ICSID

The ICSID Convention entered into force for Philippines on December 17, 1978. The Philippines has not notified any legislative or other measures adopted to make the ICSID Convention effective in its territory. This may be

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\(^{40}\) See http://www.thejakartapost.com/news/2014/04/24/indonesia-should-not-withdraw-icsid.html


because in the Philippines' legal system treaties do not necessarily need to be implemented through domestic legislation to be effective.

For the purpose of recognizing and enforcing ICSID awards, Philippines has designated the Regional Trial Court of the city or province where the arbitration proceedings were held or where the losing party resides or does business as being competent. Philippines has not notified any legislative or other measures adopted to make the ICSID Convention effective in its territory.

With regard to the practice of enforcement in the Philippines, it does not appear that an ICSID award has been enforced or has been sought to be enforced in the Philippines. This is not surprising, as there have been no ICSID awards which reached findings against the Philippines. Both of the Fraport awards found in favour of the Philippines, and the SGS dispute was settled before a final award was issued.

4.2.2 Measures since joining ICSID

**Treaty practice**

Philippines currently has 34 BITs in force signed between 1980 and 2009. Most of these BITs provide consent for an investor to submit an ISDS claim under ICSID Rules. With the exception of the Australia-Philippines BIT, none of the Philippines’ BITs appear to contain provisions specifically addressing ICSID. The Australian BIT is an exception as it does not contain clear prior consent to ISDS at ICSID. The language of the Australia BIT is similar to the Australia-Indonesia BIT (discussed above). It contains an obligation on the respondent State to consent to ISDS after a claim is submitted to ICSID. However, it does not provide clear prior consent to claims under the BIT. However, this unusual consent clause reflects practice of Australia (at the time) rather than the Philippines and so should not be seen as a response by the Philippines to any concerns related to ICSID.

The Philippines is also party to 5 multi-party ASEAN agreements containing ISDS including the AANZFTA, ASEAN Investment Agreement, and the Investment Agreements between ASEAN and China, India, and Korea. Each of these IIAs was signed after the Philippines had defended ISDS cases before ICSID, and after the first Fraport Award.

Each of these IIAs contains consent to ISDS and contains ICSID as an option for investors to choose to submit a dispute under. However, under each of these IIAs, the Philippines does not provide prior consent to disputes being submitted under ICSID Rules. Instead, for the Philippines, consent to an ISDS case under ICSID Rules must be given on a case-by-case basis. As an example, AANZFTA (and each of the other IIAs) provides:

In the case of the Philippines, the submission of a claim under the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings
shall be subject to a written agreement between the disputing parties in the event that an investment dispute arises.

Significantly, the lack of prior consent to ICSID by the Philippines in these IIAs does not prevent an investor from submitting a claim to ISDS. An investor still has the ability to submit a dispute under UNCITRAL Rules. However, it could not automatically submit a dispute under ICSID Rules. Further, the fact that the Philippines has withheld consent in these recent IIAs does not affect its consent to ICSID under earlier BITs – the Philippines has not withdrawn from the ICSID Convention and so ICSID arbitration is still available as an option to investors under earlier BITs where this is an option. Clearly this approach in recent IIAs is a direct response to Philippines' concerns with ICSID (and likely its dissatisfaction with the Fraport case).

The Philippines has included another provision in AANZFTA and the ASEAN IIAs with China, India and Korea (but not ACIA). This allows the Philippines to deny the benefits of the agreement to an investor which has made an investment in breach of the ‘Anti-Dummy Law’. This qualification can be seen as a response to the Fraport dispute, which involved an investment made in breach of the ‘Anti-Dummy Law’. However, this qualification applies to ISDS in general and so is not specific to ICSID.

Article 25(4) Notifications

Article 25(4) of the ICSID Convention allows for a State to notify ICSID of a class or classes of disputes which it would or would not consider submitting to the jurisdiction of ICSID. The Philippines has not made any notification that it does not intend to consent to any particular kinds of disputes.

5. LESSONS LEARNED AND ROADMAP

5.1 Lessons Learned

1. Both Indonesia and the Philippines have limited experience with ICSID disputes despite both being significant recipients of foreign investment and having large networks of IIAs which provide for settlement of disputes under ICSID Rules.
   - This suggests that joining ICSID will not, in itself, lead to increased ISDS disputes.

2. There is no evidence that joining ICSID has, in itself, had a significant impact on the economy or investment framework of either Indonesia or the Philippines.
   - There is inconclusive evidence that signing BITs has an impact on FDI and no evidence that joining ICSID has a direct impact on FDI.
   - There are multiple determinants of FDI – economic factors are more important than whether or not a country concludes BITs or joins ICSID.
3. The experience of Indonesia and the Philippines suggest that the outcomes of most of their disputes would not be substantially different whether under ICSID or non-ICSID Rules.

4. Most of the concerns which have arisen from the experience of Indonesia and the Philippines with ICSID apply more generally to ISDS – and are not specific to ICSID.
   - One exception is related to the ICSID annulment system – the Philippines expressed strong concerns following the Fraport case that ICSID annulment committees were exceeding their mandate and taking an overly broad approach to review of awards.
   - This led to a review of the annulment process by the ICSID Secretariat and arguably contributed to a more restrictive approach to annulment by subsequent annulment committees.

5. Neither Indonesia nor the Philippines have experience enforcing ICSID awards.
   - It is not clear how existing laws and processes on the recognition and enforcement of awards would be applied to enforce an ICSID award.

6. The experience and actions of Indonesia and the Philippines demonstrate the importance of addressing any concerns or qualifications with ICSID at the time of joining.
   - The Philippines has withheld consent to ICSID in recent agreements, but did not do this in earlier BITs
     - withholding consent in recent treaties does not remove consent to ICSID arbitration in earlier IIAs.
   - Indonesia recently made a notification under Article 25(4) of the ICSID Convention that it would not consider consenting to ICSID arbitration for disputes related to decisions of Regencies
     - this notification is unlikely to remove broad consent to ICSID arbitration under existing IIAs which are not limited in this way.

7. The experience of Indonesia and the Philippines demonstrate some of the advantages of ICSID:
   - Jurisdictional requirements (e.g. Fraport); and
   - Expedited preliminary objections (e.g. Rafat Ali Rizvi).

8. The experiences of Indonesia and the Philippines also demonstrate some advantages and disadvantages of the ICSID annulment system:
   - Advantage: may provide a better chance for a respondent State to have an award annulled than the process for non-ICSID awards (Amco).
   - Disadvantage: Fraport provides an example of how some ICSID ad-hoc Committees (particularly in the early cases) have been seen to go beyond their mandate – and to review the merits of an award.
– Whether this is an advantage or disadvantage in a specific case depends on whether the respondent is seeking or opposing annulment.

5.2 Roadmap

This proposed roadmap is based on an assessment of the advantages and disadvantages of the settlement of ISDS disputes under the ICSID Convention and ICSID Rules (which was the focus of the previous report), and the experience of Indonesia and the Philippines with ICSID.

1. Assess the advantages and disadvantages of joining ICSID from the perspective of Vietnam’s priorities and policy interests:
   – identify key issues and any concerns; and
   – process informed by consultation with relevant stakeholders.

2. Consider whether joining ICSID would require any changes to Vietnamese laws, regulations or practices. This may include laws, regulations or practices related to:
   – the domestic review of or challenge to international arbitral awards;
   – the arbitrability of certain kinds of investment disputes; and
   – the recognition and enforcement of international arbitral awards.

3. If changes to domestic laws, regulations of practices are required, consider the options to make these changes and identify the preferred approach.

4. If Vietnam decides to join ICSID, it must be in compliance with its obligations under the ICSID Convention by the time it enters into force for Vietnam;
   – any necessary changes to laws, regulations, or practices must be completed by the time of entry into force.

5. If Vietnam decides to join ICSID, it will have to designate a court or other authority as competent for the recognition and enforcement of ICSID awards and notify the Secretary-General of ICSID of this designation.

6. Vietnam should consider whether it wishes to make a notification under Article 25(4) of the ICSID Convention with respect to a class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre:
   – note that a notification under Article 25(4) is not likely to be interpreted to override broad consent to ISDS given in existing IIAs;

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44 I understand that the National Consultant engaged during this project has examined whether joining ICSID does require changes to domestic law, regulations or practices, and the options to address this. I expect that Vietnam’s consideration of this issue would be informed by the National Consultant’s report in this respect.
45 See Article 69 ICSID Convention.
46 Article 54(2) ICSID Convention.
– if Vietnam wishes to exclude certain kinds of disputes from ICSID jurisdiction, it could address this in future agreements (by not providing prior consent to ICSID for certain categories of disputes), but this would not directly affect consent given under existing treaties.

7. Vietnam could consider whether it wishes to make other notifications to ICSID:
– under Article 25(1) of the ICSID Convention, parties may designate subdivisions (such as provincial governments) and agencies as competent to become parties to ICSID disputes. States may also notify ICSID that no approval by the State is required for the designated subdivision or agency’s consent to submit disputes to the Centre.47
– Vietnam may wish to notify ICSID of the legislative or other measures taken to implement the ICSID Convention.48

8. Vietnam would follow the steps necessary to become a member of ICSID. These are set-out in Articles 67 to 75 of the ICSID Convention. The process of joining the ICSID Convention consists of the following steps: (i) signature; (ii) ratification; and (iii) entry into force. ICSID contains some useful information and guides on the membership and accession process.49

6. RECOMMENDATIONS

Based on an examination of the experience of Indonesia and the Philippines with ICSID, this report makes the following findings and recommendations:

1. Notes that there is no evidence that joining ICSID has a direct impact on the level of FDI or broader economy of an ICSID member.
1.1. In the case of Indonesia and the Philippines, there is no evidence of a direct impact of joining ICSID on their investment framework or economies.
1.2. Joining ICSID may have a ‘signaling effect’ which could be expected to encourage investment. However, it would be difficult to measure the magnitude or impact of any such signaling effect.

2. Notes that both Indonesia and the Philippines have relatively limited experience with ICSID disputes (or ISDS disputes more generally) even though both are significant recipients of foreign investment and have large networks of IIAs which provide for settlement of disputes under ICSID Rules.

47 Article 25(3) ICSID Convention.
48 Article 69 ICSID Convention.
49 See Memorandum on the Signature, Ratification, Acceptance or Approval of the ICSID Convention, available at: https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/Memorandum-on-Signature-and-Ratification-Acceptance-or-Approval-of-the-ICSID-Convention.aspx
2.1. This suggests that joining ICSID will not, in itself, lead to increased ISDS disputes.

3. Notes that the experience of Indonesia and the Philippines suggest that the outcomes of most of their disputes would not have been substantially different whether under ICSID or non-ICSID Rules.

4. Notes that neither Indonesia nor the Philippines have experience enforcing ICSID awards.
   4.1. There have been no ICSID awards which have found against the Philippines, and only one ICSID award which has found against Indonesia.

5. Notes that since joining ICSID, both Indonesia and the Philippines have taken action to address some concerns related to ISDS and ICSID, either through their treaty practice or through Article 25(4) notifications.

6. Notes that neither Indonesia nor the Philippines have sought to withdraw from ICSID.

7. Recommends that, should Vietnam decide to join ICSID, it should address any concerns it has with ICSID at the time of joining the Convention.
   7.1. This may include making a notification under Article 25(4) of the ICSID Convention and/or through modifying its treaty practice.
   7.2. This may also include a stock-take and review of Vietnam’s existing IIAs.