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Shreya Gupta: Hello everyone and welcome to the last session of day two which is the session on ICSID Arbitration: Opportunities, Concerns and Alternatives. It gives me immense pleasure to introduce, I think what is the most dynamic panel. I have been lucky enough to be a part of so far. To introduce our moderator, Mr. Madhvendra Singh, he is a Navy Commander appointed to the Ministry of External Affairs by the Government of India and apart from having experience and in acting as an arbitrator, he often advises the Government on matters of International Commercial Arbitration, Maritime Law and various investment disputes as well. With that, I move on to our speakers for today. We have Ms. Claudia Frutos who is a partner with Curtis Mallet. She is based out of Washington DC and has in addition to of course a very flourishing International Commercial Arbitration practice. She has extensive experience in ICSID arbitrations and other investor State dispute resolutions. She has represented a number of State Governments during the course of her career. Welcome Claudia. Our next panelist is Jan Paulson who needs no introduction. He is one of the most celebrated arbitrators with over 40 years of experience and has represented both investors as well as a number of State entities. Welcome Sir. Next I move on to Meg Kinnear who is not only the Secretary General of ICSID but also the Vice-President for the world Bank Group. On an average, she handles maybe 300 investor State arbitrations every year

which is a feat in itself. Welcome ma'am and our last but not the least panelist for today is Mr. Prabhash Ranjan who is a Senior Assistant Professor at the South Asian University. He is author of number of articles and papers which he does on a daily basis and has also authored the book India and Bilateral Investment Treaties- Refusal, Acceptance and Backlash. Most recently he has been invited as an expert witness on the relationship between India and BITs which is a very complicated relationship. Safe to say. Without further ado, I hand over to the panelists. I would only like to point out that this session is being transcribed.

Madhvendra Singh: Thank you Shreya. Thank you so much for that crisp introduction to all the speakers. Hello and wishing a very pleasant evening to everyone. It is my pleasure today to be moderating this session alongside distinguished panelists like Jan, Claudia, Meg and Prabhash and I will not miss this opportunity to thank MCIA for giving this opportunity and also to congratulate Neeti and Madhukeshwar for having put this whole event together at this scale. I mean it is impressive. Thank you. So the International Centre for Settlement of Investment Disputes was commissioned in October, 1966 and today has an impressive 155 State signatories to it. Although India is not a signatory yet. Today we are going to talk about the

ICSID Convention: The opportunities, concerns and the alternatives. Just for the information of the participants there are not much housekeeping announcements. There is just one that you can put in your questions in the Q & A Section but we will take the questions only towards the end. ICSID also provides the facilities and administers the international investment disputes under the ICSID Convention, the ICSID additional facilities and the AF Rules and also UNCITRAL Arbitration Rules. Now speaking of the customary international law, I am just trying to put things in perspective that every State has a sovereign right to legislate to basically prescribe laws and to enforce and execute those laws in its jurisdiction and lay down procedures and adjudicate by the courts provided by their own Government. Also, it is pertinent for me to mention as since we are trying to create the narrative that recently the figures given out by the United Nations Conference on Trade and Development gives out very impressive figures about the dazzling FDI influence which India has seen recently. Just to quote, year 2020 in the amidst of Covid pandemic. India was the only country among the only two countries that have had positive FDI inflows. India saw a figure of 30% increase in FDI. China saw 2% and none other, everybody else had a decline. I am saying that because there is a belief that a good robust dispute resolution mechanism in a country is responsible for attracting investment in

that country but seeing the dazzling FDI figures of India that may not be or maybe true we will see that little later. India saw its first adverse award in 2011 from the White Industries Australia and unilaterally rescinded most of its bilateral investment treaties and came up with a model BIT in 2015. In fact, Prabhash was one of the members of the Law Commission which reviewed that model BIT the Commission 216. Now, one of the reasons for this skepticism that India has had is of course an absence of a provision to challenge the ICSID award but as also is imbalance which is felt that there is no obligations put on the investors but too much on the Home State. Also it does not really like the idea of investors, you know selectively borrowing favorable clauses from third country agreements and also go about treaty shopping. So I come to that skepticism a little while later. Now to talk about, in fact if we have to speak about the India's legal position on investment treaty arbitration, we have to talk about the BITs but in a little while but let's first start with ICSID Convention. So Meg you are the Secretary General. I would like you to give an opening pitch why should India join the Convention? You know that India is a growing economy. It certainly wants to protect like any other State, the powers to regulate the trade and investment at par with its domestic parties. But at the same time, now India is emerging as a capital exporting State. It is the responsibility to protect its investors abroad but I feel

and I have been reading the literature, I realized that India is not the only country, which has certain concerns with the ICSID Convention because I see Latin American countries and even Africa and South Asia they have concerns. Let's start with you. Give me your opening pitch and let's see what you have to say that why should India join the ICSID Convention? Over to you.

Meg Kinnear: Thank you Madhvendra. It will be no surprise that I certainly believe that the time to revisit the discussion on joining ICSID for India is right now. First of all, the past concerns about membership, I think have largely been addressed mainly by the model Bit of 2015 which of course is fully consistent with the ICSID scheme including things such as a double key definition of investment which is now incorporated in the model BIT, exhaustion of remedies which is very much consistent with Article 26 of the Convention. Key exclusions things like exclusions for taxation and measures by local Government, an obligation to have investors act in compliance with domestic law. I think a lot of the hesitations that used to be mentioned have really been addressed by that. You will note in particular that the model BIT does contemplate ICSID membership and to make that contemplation real India would need to join ICSID. You have noted in particular the huge gains India has made in terms of recent economic policy and

it's focus on investment liberalization and in particular obviously you will want to continue that progress and accelerate it post pandemic. It's an important thing to note that has not just been progress in terms of FDI and investment into India. Another important aspect of that has been outward investment by Indian citizens and of course these BITs require and address both inward and outward investment. ICSID is a strong signal about the investment climate and will support those primary goals. Secondly, many don't realize that ICSID is both an institution and a set of rules and an arbitral facility. From an institutional perspective, ICSID is one of the five institutions of the World Bank. It is the only one that ICSID is not a member of. I would suggest that it's time for ICSID for India to take its place at the table at ICSID. It's eligible to join at no cost. This is a table with 155 other member States including all of the G-7 States and all of India's close neighbors in proximity as well as those countries that it tends to trade with UK, EU countries, USA, it's main trading partners. Joining gives India vote on all governance measures. I think this is especially important right now because ICSID is in the middle of a rules amendment process. It is dealing with key issues, things like security for costs, third party funding, expedited investor State and investor State mediation and I truly think India should and would want to be part of shaping those rules for the future.

Membership is also a way for India to highlight domestic expertise in this field as it gets the right as a member to put eight people onto the panels which are a pool for appointment. Thirdly, in my last set of points here is as an arbitral facility and a set of rules. ICSID is the world premier investment arbitration institution. It has done over 70% of all known cases, more than 800 cases now. It is well-documented as the least expensive option for investor State with very low institutional fees and a cap on arbitrator fees that is typically two to three times less than what is paid in the UNCITRAL Rule scenario. It is well-known for its expertise and impartiality. It operates in all regions of the world and has a well-known set of rules that treat investors and States equally regardless of a development status or regional location. Litigants always work within that delocalized system. In other words, you are within proceedings at the Centre and that means that you will never be in the States of your adversary, in their domestic courts nor in the domestic courts of a third unrelated State which tends to happen when you have a non ICSID scheme. Finally, these are rules that very much are designed for investor State. They have things, for example like a screening before the case starts to ensure it is within jurisdiction. It has this double key whole definition of investment, summary motion to dismiss claims manifestly lacking in jurisdiction. A number of procedural mechanisms baked into the ICSID Rules

that are very specific to the investor State context. In terms of Rules as well, ICSID has always been a leader in transparency and offers the most transparent set of investment rules which is clearly important to India. When you look at the model BIT and what it addresses in terms of transparency and most important of all, something we will discuss in detail later. It has a unique enforcement mechanism which is truly the goal standard. We will talk more substantively about that but it is certainly a benefit of ICSID membership, it should be kept in mind.

Madhvendra Singh: Thank you so much. Indeed, that was a great opening pitch, I must say but I can see that Prabhash really does not look very impressed. He is very pensive. So that brings me to Prabhash now. In fact, I am very heartened to note Meg that you are acknowledging. I am sure you are following the developments in this jurisdiction what India is doing. That you say that Model BIT is addressing most of the concerns and that ICSID does provide a very convenient forum for investor State dispute resolution. So Prabhash you are the member of Law Commission 260 which was tasked to analyze the Model BIT of 2015. Would you take our participants little into the recent not too far back but a little recent background of the skepticism of India about the ISDS mechanism itself and tell us why India was and why India still is skeptical about the ISDS in general and ICSID

Convention in particular? One of them, of course we mentioned about is the absence of the mechanism for redressal and of course I would come to you once again little later to talk about the deeper aspects of the BITs and the reforms that we are going through and the discussions that are happening but for the time being in the next two minutes, if you can briefly take us into a recent background of what happened especially from 2011 and what is the skepticism all about that India holds?

Prabhash Ranjan: Yeah. Thank you so much Madhvendra. Let me first say that I am extremely delighted to be part of this discussion. Thank you to MCIA and to ICSID for this opportunity. I will basically divide India's concerns about ICSID Convention or ICSID membership into two parts. The first set of concerns pertains to concerns related to ISDS mechanism. Now India lost the White Industries case and after that India was sued by large number of foreign corporations for BIT breaches. Recently India has lost a few more cases. Now perturbed by these developments, India decided to unilaterally terminate a large number of investment treaties and also decided to come up with a new model investment treaty and if you carefully read the model investment treaty India's skepticism towards the ISDS mechanism is writ large. While India has not rejected the ISDS mechanism like a few other countries but it has

conditioned its jurisdiction or the acceptance of the ISDS mechanism to a large number of conditions. Now India's concerns about lack of transparency with the ISDS mechanism or the argument that the ISDS mechanism is biased in favor of foreign investors and against developing countries like India or the argument that the ISDS mechanism does not quite respect the sovereign right to regulate of individual countries. Now, some of these concerns about ISDS are also projected as concerns with ICSID Convention or ICSID membership and this to some extent explains India's reluctance about joining ICSID. Now whether this is a valid concern or whether these criticisms are valid, I leave that question to be decided on someday later but these are concerns which India presently has, at least the Indian Government presently has. The second set of specific concerns pertains to issues of enforceability as I see it. Of course, let me say that Indian Government has not put out the paper or has not spelt out in black and white what its objections with respect to ICSID Convention are, but as I see it, one of the important concerns that India has or would have is about enforceability. We all know that when it comes to enforceability of investment treaty awards, the enforceability of ICSID arbitral awards is different from non-ICSID arbitral awards. In non-ICSID arbitral awards, there are opportunities to contest the award at the seat of arbitration and also to resist the enforcement of the award.

Now these opportunities are not present when it comes to ICSID Convention. The only option available is to go for the annulment of the award and the reason for this is Article 54 of ICSID Convention which says that ICSID arbitral awards are to be considered as the judgment of the court of that State. Now, as per my understanding I think India would like to have greater control over arbitral awards in case it loses cases. In case there is an adverse award issued against Republic of India and perhaps the Government thinks that in non-ICSID arbitral forums, they have a greater degree of control in trying to challenge the enforceability of the award or try to set aside the award. One of the important requirements or one of the grounds on which you can challenge the enforceability is public policy which is also reflected in the Indian Arbitration Conciliation Act but this will not be true for ICSID arbitration. I guess it's the fear of losing control when it comes to ICSID arbitral awards especially in situations of adverse arbitral award that perhaps is one of the reasons why India has decided not to sign ICSID Convention.

Madhvendra Singh: Prabhash that's very rightfully actually, very rightfully you have been able to frame concerns. I am sure Meg is making note of that but now you also mentioned about a concern which is more inclined towards the developing countries you said and of course the concerns

about the enforcement and the control of the award is very relevant, I understand. So, before I move on, I just want to tell our participants that Prabhash has actually authored a book which is titled India Investment Treaties and I suggest that you can have them for a reference. So now Claudia we have witnessed a few Latin American countries like Ecuador, Bolivia and Venezuela. They have denounced the ICSID Convention in 2007, 2009 and 2012 respectively. What happened? Did they realize that this Convention is putting them to disadvantage? If yes, then how and what actually resulted with these countries exiting the Convention and also tell us, I was trying to understand it, what are the repercussions of such an exit. I mean you are a part of ICSID earlier and then you move out of it. What happens there? I will of course come back to you asking about the alternative forums for going for these investment disputes. But what really happened. What were the problems, the concerns that States and your jurisdiction were facing that made them exit this Convention?

Claudia Frutos-Peterson: Thank you Madhvendra. I also want to thank the Centre and ICSID for the invitation. This is wonderful to be here with all of you. What happened that's a very fundamental question. I think that Latin-America was asking as you say in 2007 with the exit of Bolivia the denunciation of the ICSID Convention by Bolivia and then

Ecuador and then finally Venezuela. I think at the time when those three Latin American countries were leaving ICSID, there was of course a lot of commotion and not only in the region but I think from the World. The question on whether the fact that those three Latin American countries denounced the Convention that was actually you know a point that other countries they needed to access and I think at that point in time a lot were discussing over the legitimacy of the ICSID system. Whether the concerns of those three Latin American countries brought to the table for discussions. One of the points is just <inaudible> was one of the biggest points that they were concerned about that but also one of the biggest criticisms of the three countries made is that they were putting forward the argument on the ICSID legitimacy concerns in connection with the system. Ultimately, I think with time, we came to realize that one of the important points for the three countries was more of a political and maybe a political economic recession that the 10 countries faced. When you dig a little bit more into the reasons of the three countries, I personally think that of course there were some dire concern for the country side but others probably were part of the whole confusion in the sense that not the three countries wanting to put to refute with what prohibited the practice of international arbitration. I think that's important to say because originally, I think people were concerned that was the direction that the whole

Latin America was taking. In fact, we saw that later on some of the Latin American countries actually they even ratified the ICSID Convention even despite the fact that those three countries left ICSID. I think for Latin America being one of the blocks in the wall that has ratified a lot of bilateral investment treaties and a lot of international investment agreements with investment in chapters which calls for ICSID arbitration, additional facility arbitration, UNCITRAL arbitration cases, I am sorry. You will realize that Latin America is doing a lot of investment administration cases. In fact, when you take these statistics, and thank you Meg for sending me those statistics on Latin America that was really useful but when you really go into these statistics, you realize that Latin America continues to be a big block. Do we need to say the arbitration cases in 2008 by checking the statistics, I realized that it's still 34% of the cases that ICSID register. They concern even one way or another Latin American country and probably this is connected to the fact that as I was saying all these countries, they have a lot of <inaudible>. So, I don't know if I have a correct answer here. It is true that when you go back in time and look at the reasons and the causes that the three countries decided to apply in order to leave ICSID you realize that they were also pushing to create their own parallel system to have a system where they could resolve investment disputes. Very similar actually to the ICSID system. At the

end of the day that never really came into light. What we did see in fact is that especially Ecuador and Bolivia, they terminated, if not all of the bilateral investment treaties that they concluded most of the bilateral investment treaties. So, but they still rely a lot on the practice of international commercial arbitration. I know that at some point a lot of the commentary was saying that Ecuador was actually going to be completely out of the system. Venezuela was going to be completely out of the system. When you really look at what is going on, you realize that they are not completely out of the system, and probably because they still have some of those international agreements that they are respecting and they are handling cases still. The situation as we have it right now the ICSID is…

Madhvendra Singh: I see that Claudia is finding a conflict of interest since you have been at ICSID before but Meg I will give you, I would want you to like take a minute. Now that you heard both Prabhash and Claudia. Claudia has been a little more diplomatic though but can you like in a one minute, I mean tell us that their concerns are being addressed and what are you looking at? Also, Meg just briefly tell us like if a Country exits the Convention then what is the procedure for joining again and what happens? What are the side effects of that?

Meg Kinnear: All right. Just in terms of the Claudia's question, I think just the point I want to underline is well the three apparently left ICSID and I suggest if you look at the record that wasn't about ICSID services but was more about a political issue since then more than 14 have joined. I don't see it as a denunciation of the system at large. We still have more than 20 cases with respect to Venezuela done under the additional facility. These States are still a part of the system in a different way. In terms of joining, we have always said States are sovereign, they are welcome to join ICSID, they are welcome to leave ICSID and they are welcome to rejoin following just the regular process. I hope at some point you will see those three States back in the family.

Madhvendra Singh: Thank you because Claudia raised the very concern of the legitimacy of ICSID itself. Okay. Jan has been really waiting patiently waiting when I am going to come to him. Okay. Great Claudia, Meg thank you so much. Now that we have heard the opportunities that ICSID brings and the concerns from the both Latin American and the South Asian perspective. I want to understand also for the benefit of our participants, how this whole landscape of investment arbitration has evolved over a few decades and who better than Jan who can tell us about it because Jan you have been practicing this particular field for the last 40 years, I guess. First 20 years you have been representing States and

the next 20 years you have been adjudicating as an arbitrator. Do tell us also for the benefit of all of us that how has this one jurisdiction evolved and do you agree or not agree? I don't know if it is a belief or disbelief or a misbelief or a myth but yes people do think that ICSID favours the rich investors of the West by protecting them from the Host State jurisdiction. What are your views on that one?

Jan Paulsson: Well, thank you very much. I am pleased to have been invited to be with you here today. Take a few steps back and look at the beginning when the ICSID Convention was being elaborated and negotiated. I was not yet a teenager. We were in the early sixties and discussions were had all over the world to talk about this new idea of ICSID. Large conferences were held in Addis Ababa for Africa, Bangkok for Thailand, Santiago for Latin America, Washington Geneva for the Northern countries and every single delegate who negotiated that treaty was representing a State, every single one of them. Everyone with a duty to represent the interests of States not to maximize profits of corporations obviously. That's true of every single bilateral investment treaty and that's true of even more true of every investment statute negotiated enacted by a Parliament. Why were these individuals at the beginning of the system so keen to promote international investor State dispute resolution mechanisms? Because they were exceedingly thirsty for foreign investment. This was the time after

colonialization or get into that but there had been an early belief by some-what in the French language was called the le polite de laptiue. The politics rupture. We, every State should be autocratic and do everything for itself economically that led to disillusion and something else was going to happen. There was a great thirst for foreign investment. Did this initiative of creating ICSID in 1965 create an immediate explosion? Of course not. So, I divide this into three periods. The first period was the first 25 years when there were nine cases and I was in high school, so I didn't know very much about this at all. It was a marginal phenomenon of interest to scholars who were wondering if anything would ever happen. Then you had two periods of particular interest to me because there is a lot more to say or a lot more happening. The 20 years from 1982 to 2000 until then you had not even a case, one case per year. It had not even had one case registered every two years. 1982 to the year 2000 you had more happening 62 cases in 20 years, that's like three cases a year. I became for some reason, became very active in that period. I was involved in 10 investor State arbitrations, not all ICSID cases, eight on the side of States, two on the side of investors. It was quite interesting to me and I reflected at the time on why this has happened and what was the reaction to these early cases? I will tell you something that may not be intuitively obvious. My interlocutors in the States tended to be two different ministries, ministry of foreign affairs

and the ministry of commerce. They had very different ideas about this. Ministry of foreign affairs wanting to do this as a problem and annoyance, something to get rid of the claim that was being raised and if it could be done on the basis of a jurisdictional objection that would be good. Ministry of Commerce was conscious of the fact that if the case was defeated without using the neutral mechanism, you would still have a very unhappy investor and they viewed this not so much as a problem to try to make go away. They viewed it as a general problem of investor relations and a very different attitude towards it. If you think about it, if you have a case, for example, if you avoid the international dispute resolution mechanism, you haven't defeated the claim, you have avoided it in the perspective of the investor. Now, my observation of the following 20 years, 2000 to 2020, that's something like 735 cases more than a tenfold increase and it's evolved in a way which is somewhat startling to me in this sense that this type of dispute international dispute resolution which before was extremely exceptional and extraordinary and treated as something very rare to be considered very carefully when you went into it. You were very aware of every step that you took because this was unusual has become something which is relatively routine. That is a source of concern to me. I think it's important to recapture this sue generis nature of investor State dispute resolution. The search for neutrality is obvious and the advantages of

neutrality in terms of instilling investor confidence is very important. But if this type of arbitration is treated like any commercial arbitration or arbitration between two private parties, you are missing a lot of what is specific here and in the case of two private parties, you don't have one party giving up to some extent sovereign prerogatives in terms of legislation as was just mentioned and in terms of concerns for other things than making profits and hence, it is something that shouldn't be lost track of. What is to conclude, this is a very quick helicopter overview. I think the question is not, we have seen that coincidentally with this immense group of investor State arbitration, not only an ICSID but in another forum as well. By now, I have acted for 10 different States. Some of them were frequent flyers with one case, 10 cases and another one, four cases. The right question is not, does this create more investment or not. There is a coincidence of a great increase in foreign capital investment, if we look at the periods since 1965 certainly until today but that's not the right question. I think is the Host countries getting the right kind of investment. You will always get investors who are willing to come. Are you getting good investors who make long-term investments who themselves abide by the rule of law and are anxious to pay taxes and respect labor ordinances or are they in there for the short time and therefore require quick rewards as long as their friends are in power making <inaudible>

Madhvendra Singh: Yeah, I mean you have very rightfully, taken us to the journey but I would like to believe that when you say routine, I would see that it means acceptability. Is it that States have moved on to the more accessibility for ICSID now? Probably I would have like to go to Meg for some comments on that but since we are running a little late on time, I would now want to move on to Prabhash. Prabhash I would like to draw your attention to the model BIT. You see India got its first adverse award in 2011 of course from the White Industries. What happened was that the MFN clause in the India Australia BIT was invoked to use the provision of effective means of asserting claims and enforcing rights which formed part of the India Kuwait BIT. That actually came as a jolt. India unilaterally withdrew all its BITs and worked on each BIT negotiated. They are in the process of negotiating every BIT now on case to case basis. Of course, Treaty shopping is something which is very prevalent now, we all would acknowledge that. What is interesting is the absence of the FET and the MFN clauses in the model BIT. Of course, somehow India does not really like the idea of investors borrowing those beneficial substantive as well as procedural provisions from the third country BITs. Do you think this is the mindset or the right mindset for an investment seeking country? Is there a possibility for India to be modifying its ISDS approach and has it perfected the model BIT over an extent

that, that's going to find relevance in all its BITs in the future? So what do you think?

Prabhash Ranjan: Yeah, Madhvendra, I think India's model BIT is actually a reaction to all the claims that have come up against India. If you look at several clauses these are direct reactions or if I can use the word knee jerk reactions to the claims that have come up against India. Now on MFN specifically, I can understand the concern of treaty shopping or a foreign investor trying to borrow beneficial provisions from third country BITs. But the solution to that is not to have the MFN provision at all. To do away with the MFN provision is not the right way to let investors not borrow beneficial provisions. What I have argued in my book and in my writings is that what India instead should have done was to have a qualified MFN which restricts the foreign investors from borrowing beneficial provisions from third country BITs if that at all is India's concern but at the same time you retain non-discrimination as the cornerstone of investment treaty relations because that is one of the founding principles on which investment treaty law or international economic law for that matter has been built. On ISDS, again my concern is not with the ISDS system as such. I mean, I agree that there are concerns in terms of transparency et cetera. Things have definitely become better than what they were maybe 20 years back. Things are more transparent today. Many awards become public. So, what India instead needs to focus on. I

think this is something about which in India we get a little touchy is that why did these investors brought these claims against us? And as I have argued in my book, if you carefully go through all these claims. Most of these claims came up because of what I think was bad regulation. If India was a little more circumspect in enacting its regulatory measures whether pertaining to taxation or cancellation of spectrum licenses or telecom licenses et cetera, many of these cases might not have come up in the first place. I think while we should criticize and critique the ISDS mechanism and try to make it fairer, at the same time it's also important for India as a growing economy to introspect and see whether it has been able to internalize its investment treaties at all levels, central government and State governments and secondly whether it is exercising its regulatory part in a manner which is consistent with India's international law obligations. This introspection is very critical in any understanding of India's concerns with the ISDS mechanism.

Madhvendra Singh: Okay. Thank you Prabhash. Thank you very much. In fact, I have made a note of it and probably whenever this comes up for discussions, we will certainly keep that in mind. Okay. So, that makes me go back to Claudia again. Meg I am going to come to you next. You have heard Prabhash talking about what India is thinking now and what are the concerns with regards to the model BIT also. Would you tell our

audience about the alternatives that are available to ICSID and also the additional facilities that ICSID provides? Are they giving enough space to raise claims with the non-signatory States? Is Ad-hoc arbitration also a preferred forum for dispute resolution? Also do States provide a mechanism, a good robust agreement and are they willing to resolve disputes? And is it attracting for the investors to come and invest in your countries just based on the commitment that the countries are making through those agreements? Tell us about, what are the various choices of forums available for you in the absence of ICSID.

Claudia Frutos-Peterson: Yeah. Thank you. I hope that now you can hear me better. I noticed that in the chat that someone said that I was too soft when I was talking. So I am going to just scream a little bit here. Thanks you for the question, I mean, this is actually something that is spiral the whole process, the changes that we are seeing in the system, so in the sense that the BITs they do provide you with different fora, if you want to bring the ISDS cases under those treaties. So without saying that people are not doing ICSID anymore because I don't think that's the case. The countries are also, I think not necessarily countries because I remember at the first party who will be initiating the cases the claimants, so the claimants normally they are going to make strategic decisions at the beginning of the case in order to

bring the case. Sometimes the claimants, they opt not to go to ICSID but not because of a criticism to ICSID or the legitimacy to ICSID but it's more because it strategically maybe makes more sense for them to walk away. For example, from double barrel test, Meg was mentioning when it comes to the definition of investment or the requirements under Article 25 for the ICSID Convention. So they might decide, Okay, let's not do ICSID. Let's go and try to do arbitration case under the UNCITRAL Arbitration Rules which is one of the possibilities that we see in investment treaties. That's one of the biggest points for consideration in my opinion what is the strategy that the claimant is following in order to bring that case. Then of course the State is going to defend before the fora the claimant is bringing the case. For the second question, I know that we are running out of time but I want to address a little bit second part of your question in the sense that is they really bringing the fact that you have the ratification of ICSID or the fact that the States are willing to do investment arbitration is really an element that will characterize this States to be very friendly to receive foreign investment. I think, I agree with Jan that it's not necessarily, that the resent link connection, I think at the beginning of the whole process 15-20 years ago that was one of the main elements. People were saying, yes you need to ratify the ICSID Convention or you need to have this bilateral investment treaties accept to go to ISDS in that way the

country will receive more foreign investment but nowadays I don't necessarily see the link that I think there are other factors that we need to take into consideration.

Madhvendra Singh: Very well. Very well Claudia. Thank you so much. Thank you. In fact, you know Meg so much as I would wish that while you are in the seat, the number of signatory is over 190 plus but let me talk about Article 53 (1) of the Convention that reads the award shall be binding on the parties and shall not be subject to any appeal or do any other remedy except those provided for in this Convention. I wanted to bring this right in the beginning but I just wanted to look at the perspectives and then bring in this particular clause. Probably this would qualify to fall within the frame of manifest arbitrariness for the absence of jurisdiction of the Host State even in the matters of public policy. In the matter of Ecuador, we know that the House of Lords held that awards arising out of BIT disputes can be challenged in the courts of the seat of arbitration. So, being an ICSID, ICSID has really administered numerous cases. Could you tell us what is the current status of all these awards out of ICSID with respect to the enforcement and challenge and also tell us what is the prevailing culture when it comes to the enforcement of these awards by the States especially the ones having the adverse awards.

Meg Kinnear: Yep absolutely. Let me just talk about Article 53 because it is the gold standard and the very unique feature of ICSID. No other set of Rules has that. It makes ICSID awards final and binding on each of the 155 member States and that means that…

Madhvendra Singh: Meg you have two minutes, you come to the point straightaway.

Meg Kinnear: Very good. Pecuniary obligations are directly enforceable subject only to post award remedies. You can review under what's known as annulment and the annulment grounds are essentially the same as the grounds under the New York Convention but for public policy and then it's directly being able to do this is a much more efficient, less expensive way to enforce an award. It means you don't have to go to the courts of all the recognition jurisdictions or the foreign court of another domestic country which is the place of arbitration. I think this is especially important for two reasons in India right now. Number one is there is a debate as I understand it with respect to the commercial reservation under the New York Convention and whether in fact an ISDS case would be considered potentially enforceable and that creates a real uncertainty which you would not have under the ICSID scheme. The next part I wanted to note was something that Prabhash spoke about before the idea of having greater control

because there is a public policy exception which yes the ICSID Rules do not have. My question is does that really provide you with greater control? Traditionally that public policy exception is at a very high standard basically fundamental principles of justice and morality. I don't know that it gives that much protection. I have tried to find ISDS cases overturned on that basis. I have not found any. I think the model BIT actually does what is much more effective which is deal with public policy concerns upfront a right to regulate, follow the law and being compliant. That's the effective way to deal with it.

Madhvendra Singh: Thank you for that. Infact, I don't really want this to turn into debate between you and Prabhash. But yes, Prabhash I read your book and you have mentioned about the lack of transparency. I want your 30 seconds. Just tell us what your concerns about 53(1). 30 seconds.

Prabhash Ranjan: I agree with Meg at one level. I think it doesn't really give greater control but maybe it gives a perception of greater control because you have more forums available where you can challenge it. But yeah, in my view, the advantages actually outweigh the disadvantages.

Madhvendra Singh: We got the point Prabhash. Thank you very much. I have a very important question for Jan once again. I

really want to benefit from your so much of experience. I want to know from you Jan having sitting as an arbitrator for so long, what has been the line of defence that the respondents have been putting to you and what do you think the legislation of most of these States who lose in the end. Have they been a very conducive environment or what is the subtle difference between the legislative policies of two States where one loses and one just goes on fine.

Jan Paulsson: Well, an attribute of sovereignty was set by the international court in the early 1920s, Permanent Court of International Justice at the time. Attribute of sovereignty is the ability to make binding promises and it is impossible. It's been held a number of times. In cases where European countries where the respondents that they cannot invoke an internal law against it but representing a State and in investor State dispute. Let me just say why I have a bias in favor of the two specialized institutions. There are two of them ICSID and the Permanent Court of Arbitration because they are sensitive in the way they name arbitrators and in the culture because this is all they do. If you go to a general purpose arbitration institution or an adhoc arbitration where you have none of that background, you don't get that benefit and when you look at what ICSID does specifically in response to particular problems that come up with States. For example, adventurous claims that are manifestly outside the

jurisdiction of ICSID, they can be dismissed at the level of the Secretariat before the State has invested large amounts of money. There can be summary dismissal on the merits that should be available anywhere but it's explicit and that was recent. That's the institution reacting specifically to the problems that occurring and one bug bear for me as a representative of States, I really dislike that temerity of some arbitrators when faced with a request for security for costs because there are some adventurous claims and I think it should be clearer and arbitrators should be more courageous in terms of robustly doing that. That is something you get as a result of the specificity of these two bodies. I assume that there are a number of Indians listening to us here. I ask one question to all of you. If you think that it is fine for India to be a member of the Permanent Court of Arbitration as it has been for 121 years, why not ICSID and if there is something wrong with ICSID, why do you stay with a Permanent Court of Arbitration? And I would point out that there are in the ICSID treaty two articles, one dealing with jurisdiction and one dealing with enforcement. Specifically, with respect to jurisdiction, all signatory States except the res-judicata of ICSID arbitration awards but they don't commit to enforcement in their own country. So I don't expect that a defence against enforcement based on public policy will simply be dismissed by the courts of the State that has lost an ICSID arbitration. Those are two very different things. I don't think in that

sense that the State is disrobed and disentitled to invoke us on domestic public policy.

Madhvendra Singh: Thank you Jan. Thank you so much. In fact much of what you have spoken about, I think there is a lot of debate and the discussion which is happening even with the UNCITRAL Working Group. Also I just, we are running little late of time. I just want to go to Meg now and just ask her about this subject of debate which is the finality of an award vis-a-vis to the correctness of an award which brings me to the subject of appellate scrutiny at the level of ICSID because that's been also being discussed with the working group. Does having a provision of appellate scrutiny make it attractive for the States to by way of basically mitigating all the concerns of ISDS? Does it serve as a panacea for all the problems of ISDS and also address the concerns about impartiality and lack of coherence and lack of sometimes even the independence and impartiality of the appointed arbitrators and of course the costs. So what are your views Meg?

Meg Kinnear: That is the debate right there. In 2004 ICSID proposed to create an appellate mechanism and States said no. The issue has now come back on the front burner in particular because the European Union has proposed a full two level court, first trial level and second appellate level. It is being discussed at working group three. It is unclear what the

result will be. There are those States who say things work fine as they are simply need to upgrade, update some of the rules in the fashion that ICSID is doing right now. They feel the main problem is the substantive obligations and definition of those and that new architecture is not going to address what people identify as the problems not to mention the cost of setting up in sui generis International Court. Others feel that it is important to set up such a court in particular for the legitimacy and perceptions of legitimacy and I think you could identify a third group that says the system works well. We are improving at all times but perhaps we could have an appellate body on top of the current level of tribunals sort of hybrid. Nobody knows how this discussion will turn out. I think there is a lot of discussion to do between now and any final conclusions. This has been around since well before 2004 and we shall see where it goes.

Madhvendra Singh: Yes in fact I see that this particular provision is figuring in the international investment agreements of a few countries to say the least. Also okay gentlemen thank you very much. It has been really a pleasure discussing about the substantive topics that we had. Now maybe we can like sum up, I just have one last question for all of you. This is a very important question. Shreya just give us two minutes each. We are just going to wrap up. In fact, this question would serve to wrap up all the issues together. I

would like to seek comments from everyone, starting with Jan. Basically this is about the subject of the fine balance between the investor rights and the State obligations. We know that the clauses of FET and MFN are missing from the BIT. Ghana has explicitly and clearly defined what are the investor obligations in their agreements and South Africa has equated ISDS <inaudible>. They have their own mechanism and in fact Australia is making provisions to negotiate on a case to case basis. How do you draw this balance? What are your final views on this particular subject that what are the rights of investor and obligations of the Host State? We start with Jan followed by Meg, Claudia and then Prabhash can give concluding remarks.

Jan Paulsson: I can be short. I think in this way the lines to be drawn to affect this balance will always be moving and will never be settled.

Madhvendra Singh: That is perfect. In fact, Jan before I forget, I just want to make a remark to that statement you made that there is always a conflict of understanding between the Ministry of Foreign Affairs and the Ministry of Commerce. That is always going to remain as it comes to like ratifying Conventions like this. Okay Meg. The final remarks on the balance that you have investor rights and the host State obligation.

Meg Kinnear: Yeah. It is quite correct that the balance comes first and foremost in the individual countries BIT and it will be in different places for different countries and we are seeing these changes. We are seeing things like denial of benefits clauses et cetera but I wanted to just add one point which is very important. Apart from the BIT, look at the arbitral rules and certainly I am very convinced our arbitral rules are balanced. One of the biggest myths in investment is that investors always win or States always win. Our ICSID statistics shows year after year after year about 35% of the cases settle, 31% are in favor of the investor and 34 in favor of the States. The imperial data that we have is that this is very much balanced results.

Madhvendra Singh: Perfect. Claudia?

Claudia Frutos-Peterson: Thank you. I think is actually what we also need to. I agree with Jan and Meg what they are saying but I think we also need to look at the work of the arbitral tribunal. Through those decisions, in the sense that they of course have great responsibility on really achieving this balance. I think the more mature, the more evolution that we see on the system. It also has an immediate effect, so we saw it with NAFTA. For example at the beginning how NAFTA develop and then how the contracting States of NAFTA they needed to

intervene to issue interpretive notes for those arbitral tribunal in order to give them the framework what they were thinking when they were negotiating those contracts. I think of course, as Jan said it at the very beginning, I mean, the fact that we have ISDS is because the States, they are willing to weigh their sovereign powers in order to go to this type of settlement dispute mechanisms. So let's not forget that. That of course is going to really have an important element or whatever that is called role of ISDS because the States, they are a big component of this if not the most important component of the system. Thanks.

Madhvendra Singh: Yes. Prabhash?

Prabhash Ranjan: Yeah. My quick comment is about India because that's what I have studied for the last several years. I think in India the balance or the pendulum initially was too much in favor of investors and in the last four to five years, it has swung to the other end/to the other extreme and too much in favor of the State. I think it needs to be brought somewhere in the middle maybe. We require a separate seminar for that.

Madhvendra Singh: Oh, that's perfect. Perfect. Summing up by Prabhash. Thank you so much Prabhash. In fact, I would say that was really meaningful summing up of what the issues with respect to bringing out all the aspects about the balance.

Now, in the end I only like to say not to Meg that I hope that we are able to weed out all the concerns and convert the challenges I mean all the alternatives into the opportunities and that you have 190 plus members to your Convention. Shreya, I understand MCIA has given us an extension of five minutes but we need to take a few Q&A. Let me just see if we can take one or two at least. The first question I have got myself on my Whatsapp from a dear friend of mine is that he wants to understand from Meg that what is the mechanism that you follow for the appointment of arbitrators in tribunal for these investor States disputes? What goes like there is a debate going on in India is the appointment of retired judges and technical arbitrators. You tell us what is a provision for mechanism that you follow.

Meg Kinnear: First and foremost, we follow whatever is in the treaty. Most treaties allow each party to select a party appointed arbitrator and those parties usually agree on a Presiding. Where they can't they can ask the Centre to intervene and to assist them with this process and where that is requested, we offer usually a ballot which is here's a list of five people. Would any of them be mutually acceptable or a list where parties rank from one to five and the best ranked would be the Presiding. If parties don't choose that, ICSID will select someone from the pool of arbitrators that is the names given by member States. I said earlier, if India joined,

it could put eight people into this pool. We are able to pull someone from that pool and that pool consists of the world's most experienced arbitrators, different nationalities, etc. I should also say we have been trying very hard and I think have had some success in increasing diversity of the arbitral group in particular regional diversity and gender diversity. That's a concern, I think of all institutions right now but that's the basic process and throughout we consult the parties on the attributes of the arbitrators that they want. That's a quick how appointment is done.

Madhvendra Singh: Perfect Meg. Thank you so much. I would urge the panelist also to just go through the Q&A and see if there is any question that is of interest to you. There is a question for Jan Paulson. How do we make ISDS an exceptional dispute resolution route? Would you advocate greater jurisdictional requirements to deter investors from approaching tribunals?

Jan Paulsson: Would you require what? I didn't understand that.

Madhvendra Singh: Would you advocate greater judicial requirements to deter investors from approaching tribunals?

Jan Paulsson: Well, this is as Meg just said that ICSID respects what has set forth in particular treaty. This is certainly a possibility but then if a State takes back with one hand what it gives with the other, I am not sure you have achieved very much and if the approach to investor relations is always a compromise which becomes unpredictable, I don't think it gives investors very much to feel confident when they make their risk analysis and in choosing as many important investors do and choosing between one target host country and another to weigh in the balance of all of that choice.

Madhvendra Singh: Okay. Thank you Jan. Prabhash there is a question for you. It says does termination of BITs will have an impact on the investments in India? What do you think? Quickly, 30 seconds if you can tell us. Does it really affect the investments or like initially we started off saying that the impeccable FDI record that India has had despite rescinding all its BITs and going on case to case basis. What do you think? Briefly tell our participants how much effect does it has?

Prabhash Ranjan: Yeah. I am not an economist but the empirical studies that have been done in India, they suggest that there is indeed a co-relationship between investment treaties and FDI. There is a recent study which the Indian Council of research on International Economic Relations has published and

their findings are that cumulatively speaking BITs and ISDS have had a positive impact on FDI in flows in India. There is another study which has recently argued that termination of investment treaties will have a negative impact on FDI inflows in India. There is limited empirical evidence which shows a positive relationship between the two.

Madhvendra Singh: Claudia would you like to take that question with respect to your jurisdiction?

Claudia Frutos-Peterson: Which question, the one that…

Madhvendra Singh: Does terminating these BITs and not being a part of a Convention like ICSID, does it really affect investments in your country or does it have no effect at all?

Claudia Frutos-Peterson: Yeah. Listen. I think you have a different kind of studies that they are out there. Some of course in favor as Prabhash was mentioning and indicating that their relation but they always comes into the debate that the example of Brazil. Brazil has ratified a few bilateral investment treaties. Most of the ones that Brazil has ratified, they don't have a provision for ISDS, so when it's still Brazil is one of the most important countries in the world receiving foreign direct investment. So, I think the debate continues. I don't think that I have the answer. I am

not an economist either but what I think when you talk to clients, the fact that the State has a BIT. It is an element. I will say.

Madhvendra Singh: Claudia that's true. Also something which is I mean not very insignificant. I would say that also the mindset of investors who are investing in a particular country. Do they have a really kind of a business mindset or they are like litigative kind of mindset. Certain people come for investments looking at disputes arising out of and benefiting all of those things. But anyways, I think with that, we have come to the end of our session and as a concluding remark, I would just like to emphasize on the importance of keeping in mind as arbitrators and the practitioners of arbitration is the importance of party autonomy should always be kept supreme and the freedom and the flexibility that this ADR provides to other parties involved are the cornerstones of ADR. It's not really always important to do good things but as is also important to prevent bad from happening. I think all of us should put our foot together, pull together and ensure that the arbitration moves in the right direction. In the end the only thing left for me to do is once again thank MCIA and thank Neeti and Madhukeshwar and Shreya for the introduction and all the panelists distinguished panelists. I have had an opportunity to speak

with you all. Wonderful. Thank you so much. Shreya I will hand it over to you for the conclusion. Thank you.

Shreya Gupta: Thank you. Thank you Madhvendra. A big thank you to all the panelists for a very enriching discussion. With this we come to a close of day two of the India ADR Week. There will be sessions again from tomorrow 10:00 AM onwards and I really hope to see all of you there as well. Thank you. Goodnight.