

INTERNATIONAL INSTITUTIONS AND DISPUTE SETTLEMENT: THE CASE OF ICSID

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Introduction

Disputes between States belong to the realm of Public International Law. These disputes are often resolved by two basic techniques of conflict management: diplomatic procedures and adjudication.¹ For this purpose Public International Law discusses matters as the law of international organisations, the law of treaties, human rights, humanitarian law, international courts, etc. However, where the State exercises a commercial function, either by itself or through a State entity and enters into a business relationship with a private party, any disputes which arise are likely to be referred either to the courts of the State concerned or to international commercial arbitration. Almost invariably, the private party to such a contract will prefer arbitration as it is a 'neutral' process.

Arbitration is the alternative jurisdiction to national courts which are specifically established by the State to apply and uphold the law and determine all forms of dispute. Arbitration is also the jurisdiction selected by the parties in preference to national courts. The World Bank formed the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington Convention) which came into force on October 14, 1966.

The Washington Convention of March 18, 1965 established the International Centre for the Settlement of Investment Disputes (ICSID)² which has jurisdiction over legal disputes arising from investments between a Contracting State and a national of another Contracting State. ICSID provides facilities for conciliation and arbitration of international investment disputes between member countries and individual investors. While international commercial arbitration focuses on dispute settlement between private parties, and inter-state arbitration involves only States, ICSID

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¹ Malcolm N Shaw, *International Law*, (Cambridge, New York, 5th ed, 2003).

² Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Aug 25, 1965, 4 ILM 524 (1965).

arbitration oscillates between international commercial arbitration and interstate arbitration. The Washington Convention has been ratified by over 140 countries.³

Importance of pacific settlement of international disputes

At one time, there was almost a tidal wave of State ownership, as newly developing nations, following the example of the former socialist State, emerged as owners and operators of airlines, merchant fleets, oilfields, oil companies, refineries and process plants – as well as banking, investment and trading corporations. This trend to State ownership was encouraged by resolutions of the United Nations directed to the establishment of a New International Economic Order, in which the State was seen as taking the dominant role in the control both of its own resources and of transnational corporations operating on its territory. However, as the tide once came in, it has now gone out and ‘privatisation’ has replaced nationalisation.

In consequence, State ownership has diminished in importance. Nevertheless, there are still many arbitrations in which a State or State entity is concerned. Many factors must be weighed in the balance when a State or State entity considered whether or not to submit to arbitration. There are political considerations, such as the effect which a refusal to go ahead with arbitration might have on relations with the State to which the foreign claimant belongs. There are also economic considerations, such as the loss of foreign investment which a refusal to arbitrate might bring about.

There are legal considerations such as the effect of an award being granted *in absentia*, as happened in the *Libyan oil nationalization arbitrations*.⁴ In addition, questions of national prestige are involved, in being seen as a State that is prepared to honour its commitments. It is sometimes said that the right of a State to claim immunity from legal proceedings forms part of its sovereign right to submit with dignity. However, one might prefer to agree with a well-known English judge who said:

It is more in keeping with the dignity of a foreign sovereign to submit himself to the rule of law than to claim to be above it.⁵

Arbitrations in which one of the parties is a State or State entity may take place under the rules of institutions.⁶ There are primarily two international institutions that are

³ www.worldbank.org/ICSID, visited on August 9, 2009.

⁴ The three major international arbitrations arising out of the nationalisation by the Libyan Government of oil concession agreements with foreign corporations which still had many years to run are discussed in Ch.2 The Libyan Government declined to take part in the arbitrations and so its case went, if not unconsidered, at least unargued.

⁵ Lord Denning in *Rahimtoola v the Nizam of Hyderabad* [1958] AC 379, 418.

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usually concerned only with disputes where one of the parties is a State entity. These are the International Centre for the Settlement of Investment Disputes (ICSID) in Washington and the Permanent Court of Arbitration (the PCA) at The Hague.

Investment disputes

In 1965, the International Bank for Reconstruction and Development (the World Bank) established ICSID to facilitate the settlement of disputes between States and foreign corporations through arbitration and conciliation arrangements.⁷ The Convention establishing the Centre has been ratified by 89 States, which then could confer jurisdiction on the Centre with respect to any legal dispute with a foreign national arising out of an investment, usually by including a proper clause in the investment contract.⁸

The number of cases referred to the Centre has been increasing; while some were settled, in others arbitral decisions were rendered. In a few cases novel annulment proceedings were instituted resulting in some instances in the nullification of the arbitral decisions.⁹ Investment disputes differ in several respects from ordinary commercial disputes. Disagreements often concern the objectives of the investment, the reparation of revenues and the ultimate control and benefit of the investment. These factors influence the conduct of the arbitration in various respects.

Thus investment disputes can have a greater impact on parties other than those involved and thus may be more in the public domain. Thus, investment disputes may

⁶ A considerable number of arbitrations involving States and State entities take place under the ICC Rules.

⁷ A H A Soons (ed), *Nova et Vetera Iuris Gentium, International Arbitration: Past and Prospects*, (Martinus Nijhoff Publishers, 1990).

⁸ Convention on the Settlement of International Investment Disputes between States and Nationals of Other States, Washington, March 18, 1965, 575 UNTS, p 159. For comments on the work of ICSID, see Aron Broches, 'The Experience of the International Centre for Settlement of Investment Disputes,' in Seymour J Rubin and Richard W Nelson, (eds), *International Disputes: Avoidance and Settlement* (Studies in Transnational Legal Policy 1985), pp 75-97; Georges R Delaume, 'ICSID Arbitration: Practical Considerations,' 1 *Journal of International Arbitration* (1985), pp 101-125.

⁹ Aron Broches, 'Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution,' 2 *ICSID Review: Foreign Investment Journal* (1987), pp 287-334; Mark B Feldman, 'The Annulment Proceedings and the Finality of ICSID Arbitral Awards,' *Journal of International Arbitration*, pp 85-110.

not only affect a specific investor but a complete class of investors, the relationship between the host State and the investor's home State.¹⁰

International Centre for the Settlement of Investment Disputes

ICSID was established by the Washington Convention of 1965.¹¹ This convention, which is less formally as 'the ICSID Convention', was formulated by the executive directors of the World Bank and was submitted by them to the governments of the member states of the Bank in 1965.

This Convention broke new ground. It gave both private individuals and corporations who were 'investors' in a foreign State the right to bring legal proceedings against that State, before an international arbitral tribunal. It was no longer necessary for such investors to ask their own government to take up their case at an inter-state level: the so called method of 'diplomatic protection'. They had the right of direct recourse against the foreign State in their own name and on their own behalf. This was a significant development. As one distinguished commentator pointed out:

At the time the Convention was concluded, some of its most important features represented significant new developments, though in the light of subsequent advances in international law they now appear almost commonplace. For the first time a system was instituted under which non-State entities – corporations or individuals – could sue States directly; in which State immunity was much restricted; under which international law could be applied directly to the relationship between the investor and the host State; in which the operation of the local remedies rule was excluded; and in which the tribunal's award would be directly enforceable within the territories of the State parties.

Investment disputes under this Convention may be raised by individual investors of one State party against another State party and if not resolved by negotiations, may be submitted to arbitration either under the World Bank's International Centre for the Settlement of Investment Disputes (ICSID) or the ICSID Additional Facility or the rules of the United Nations Commission for International Trade Law (UNCITRAL). The system was at first limited to cases where both the national State of the investor and the State party to the case were Parties to the Convention. This meant that if one party to the dispute did not meet this requirement, the matter could not be submitted to ICSID, even if both parties so wished. This problem was solved in 1978 by the creation by the

¹⁰ Julian DM Lew and Loukas A Mistelis, *et al*, *Comparative International Commercial Arbitration*, (Kluwer Law International, The Netherlands, 2003).

¹¹ Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965. United Nations Treaty Series (1966), Vol 575, p 160.

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Bank of the “Additional Facility” which permits recourse – albeit imperfect – to the main elements of the ICSID system even if only one party needs the requirements, provided that both have given their consent.

Consent to jurisdiction under the system was originally foreseen as deriving principally from express references to it in the arbitration clauses of investment contracts. However, the sources of consent have been significantly widened by the development of recourse to ICSID on the basis of provisions in inter-State bilateral investment protection and investment guarantee agreements as well as by multilateral arrangements such as the North American Free Trade Agreement.¹²

Arbitration proceedings under the ICSID convention

To create a favourable climate for foreign investment and to protect their own citizens; States have entered into large numbers of bilateral and multilateral treaties. International organisations have been established and have engaged in promoting international or regional treaties and conventions providing a stable framework for investment in an effort to create a worldwide standard for the treatment of foreign investment.

The purpose of the Convention prepared under the auspices of the World Bank, was to provide a special forum for the settlement of investment disputes in order to encourage foreign investment and world development.¹³ In 1978 ICSID created the ‘Additional Facility’ notably to enable the Centre to administer proceedings for the resolution of investor-to-state disputes where either the investor’s home or host state is not a party to the ICSID Convention. It also covers cases which fall outside the ambit of the ICSID Convention, in particular where one of the parties is not a Contracting State.¹⁴

¹² Sir Elihu Lauterpacht, in his foreword to Christoph Schreuer, *The ICSID Convention: A commentary* (Cambridge University Press, 2001), ppxi-xii.

¹³ See generally Schreuer, *The ICSID Convention: A Commentary* (CUP 2001).

¹⁴ Art 2(b) of the Additional Facility Rules authorizes proceedings for the settlement of disputes that are not within the Centre’s jurisdiction because they do not arise directly out of an investment. This is usually read to refer to disputes that arise from transactions other than investments. But a dispute that arises from an investment, though only indirectly, would also be covered by the wording of this provision. Therefore, where the connection between the investment and the dispute appears too remote to satisfy the Convention’s requirement of directness, the Additional Facility could serve as an alternative method of dispute settlement. See *Fedax v Venezuela*, Decision on Jurisdiction, 11 June 1997, 37 ILM 1378, 1384 (1998).

The arbitration at ICSID is submitted under the ICSID Rules and not under the Additional Facilities Rules of ICSID or under the UNCITRAL Arbitration Rules. Both parties to an international commercial arbitration are subjects of national law, whereas those to investor-state arbitration are operating on different planes: the State is principally a subject of international law and the individual, principally a subject of national law.¹⁵

With respect to the subject matter, issues in an investor-state dispute must be decided 'in accordance with a treaty and the principles of public international law and a decision on the dispute could have a significant effect extending beyond the two Disputing Parties,'¹⁶ possibly leading to the revocation of national laws and changes in existing regulations. Furthermore arbitral awards, even if unable to declare State measures invalid, may directly impact a State's future conduct and the national budget. Thus the public interest involved brings into question whether disputants should have the freedom to determine how their rights are regulated. To date over 100 disputes have been referred to ICSID arbitration.¹⁷ Of more significance is the scale of investment covered by ICSID clauses. In addition to arbitration agreements in favour of ICSID in investment contracts numerous bilateral and multilateral investment protection treaties and national investment laws now provide for arbitration under ICSID or the Additional Facility.¹⁸ As a consequence there has been a constant increase in the number of cases filed per year.

Scope of the ICSID convention

It is of considerable practical importance whether a dispute can be referred to arbitration under the ICSID Convention. The scope of the Convention is defined in Article 25(1):

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the

¹⁵ See Nigel Blackaby, Public Interest and Investment Treaty Arbitration, 1(2) Oil, Gas & Energy Law Intelligence (March 2003), available at <http://www.gasandoil.com/ogel/articles/welcome.asp?article_56.htm> visited on August 22, 2009.

¹⁶ See *U.S Government in Methanex Corporation v United States*, 4 INT'L ARB L REV n-3 (2001).

¹⁷ A list of the cases filed can be found at <<http://www.worldbank.org/icsid/cases/cases.htm>> visited on August 25, 2009.

¹⁸ There are around 1500 different Bilateral and Multilateral Investment agreements which refer disputes to ICSID.

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dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

The Convention requires individuals to be nationals of a State other than the one complained against and for the same purpose Article 25(2) specifically excludes dual nationals. Nationality is determined according to the rules of the State of nationality claimed and must exist both at the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered. The same principles apply to companies, except that Article 25(2)b includes also juridical persons which had the nationality of the Contracting State party to the dispute on the date on which consent to submission of the dispute occurred and which 'because of foreign control, the parties agreed should be treated as a national of another Contracting State for the purposes of this Convention'.

Accordingly, States must not only become members but shall also agree in writing to the submission of a particular dispute to the Centre, which is also achieved in a concession agreement between the investor and the State concerned. In addition to this in *Amco v Indonesia*¹⁹ it was endorsed that even bilateral investment treaties between the State parties to the Convention frequently provide for recourse to arbitration under the auspices of the Centre.²⁰ Further numerous multilateral treaties²¹ also provide for resolution of investment disputes by the Centre; the same was also corroborated in *Metalclad Corporation v United Mexican States*.²²

In 1978, the Centre introduced the ICSID Additional Facility which extends its jurisdiction to include disputes where only one of the parties is a Contracting State or a national of a Contracting State and disputes not arising directly out of investment, provided the dispute relates to a transaction which has 'features that distinguish it from an ordinary commercial transaction' and further provides for fact-finding proceedings.²³ Consequently, investment disputes fall within the ambit of the ICSID Convention if the following four requirements are met:

- It must be a legal dispute;
- The parties must have agreed to submit their dispute to ICSID;

¹⁹ 1 ICSID Reports, p 377.

²⁰ *Supra* note 1.

²¹ Article 1120 of the NAFTA treaty, 1992 and Article 26(4) of the European Energy Charter, 1995.

²² 119 ILR 615.

²³ *Ibid.*

- The dispute must be between a Contracting State or its subdivisions and a foreign investor from another Contracting State;
- It must arise directly out of an investment.

Venues for ICSID proceedings include Washington, D.C., the Permanent Court of Arbitration at The Hague, the Regional Arbitration Centres of the Asian-African Legal Consultative Committee at Cairo and Kuala Lumpur, the Australian Centre for International Commercial Arbitration at Melbourne, the Australian Commercial Disputes Centre at Sydney, the Singapore International Arbitration Centre, the GCC Commercial Arbitration Centre at Bahrain and the German Institution of Arbitration (DIS).

Arbitration under the auspices of ICSID is similarly one of the main mechanisms for the settlement of investment disputes under four recent multilateral trade and investment treaties (the North American Free Trade Agreement, the Energy Charter Treaty, the Cartagena Free Trade Agreement and the Colonia Investment Protocol of Mercosur).

ICSID has concluded 162 cases since its inception and has 125 cases pending, a third of which are against Argentina. Almost half of cases involve the services sector, and all cases involving the natural resources sector are in mining, oil and gas exploration activities. Reports of the tribunals need not be published if a disputing party objects. Since reforms in 2006 it is now at the tribunal's discretion (not the parties') to consider requests for third party submissions. Only two cases have done so, and no arbitration has permitted public attendance.²⁴

Provisions of the ICSID convention

ICSID, operates as an *ad hoc* arbitration panel and not a court with permanent judges and lacks a formal appeals process. Instead there is a review committee which lacks the power to overturn judgments made by the original panel. The Convention does not define the term 'investment'. Two drafts of the term investment were presented before the Convention delegates but both did not find support. A British proposal that omitted any definition of the term investment was adopted by a large majority of members of the legal committee.²⁵

²⁴ The International Center for the Settlement of Investment Disputes (ICSID), Bretton Woods Project, 2009 available at <<http://www.brettonwoodsproject.org/art-564868>> visited on August 25, 2009.

²⁵ Dominique Grisay, International Arbitration: the ICSID Convention: a convenient solution for companies in conflict with states, The Bulletin Volume 6 Issue 1 available at

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ICSID is an institution that was created through an international convention, and has been proven to be one of the most popular multilateral arbitration regimes in terms of the number of ratifications received.²⁶ ICSID's mandate involves disputes '*arising directly out of an investment*'.²⁷ The greatest advantage of ICSID is that it initially removes jurisdiction of the dispute from municipal courts, but later employs the courts to enforce the decision.²⁸ Use of this mechanism requires the Contracting States to enforce the decision of the Centre.²⁹ The award is to be recognized by the parties to the Convention as if it were the final judgment of a court in that State.³⁰ Failure to enforce the decision would be a violation of an international treaty, and thus would allow direct recourse to international law remedies.³¹

Party autonomy in its absolute sense means that the parties control all aspects of the proceedings and its existence, (the right to proceed, the composition of the arbitral tribunal, the rules governing the proceedings themselves and the language). Indeed, the key distinction between arbitral tribunals and courts is that the basis of jurisdiction of an arbitral tribunal is the will of the parties while the courts owe their procedural competence to the procedural norms of a State or an international convention.³² Party autonomy has been expressly endorsed in determining the procedure to be followed in ICSID arbitration.

Important provisions:

- The Convention provides, in Article 41, that: 'the Tribunal shall be the judge of its own competence'.³³ The primary purpose of Article 41 is to prevent a

<http://www.imakenews.com/iln/e_article000763642.cfm?x=b11,0,w> visited on August 24, 2009.

²⁶ Stephen J Toope, *Mixed International Arbitration: Studies In Arbitration Between States and Private Persons*, (1990).

²⁷ ICSID Convention, Art 25(1).

²⁸ Ibid.

²⁹ And contrary to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, a municipal court cannot refuse to enforce the award on grounds of public policy, thus avoiding any discussion of the validity of the *parens patriae* power by India in the Bhopal incident. See June 10, 1958, 7 I.L.M 1046 (entered into force June 7, 1959).

³⁰ ICSID Convention, Art 54(1).

³¹ Charles Vuylsteke, *Foreign Investment Protection and ICSID Arbitration*, 4 GA J INT'L & COMP L, 343, 360 (1974).

³² See Lord Donaldson in *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corp Ltd*, [1981] Comm LR 19, 920.

³³ Wetter, Vol IV, p.445. See also *Topco & Calasiatic v Libya*, Preliminary Award, 27 November 1975, 53 ILR 404.

frustration of the arbitration proceedings through a unilateral denial of the tribunal's competence by one of the parties. Therefore, Article 41 is an essential procedural corollary to the last sentence of Article 25(1), which provides that once the parties have given their consent, they may not withdraw it unilaterally. This includes the tribunal's power to interpret a party's consent in the light of the fact of that party's attempt to interpret it restrictively.³⁴ According to Article 42(1) of the ICSID Convention unless the parties have specifically agreed otherwise, the arbitral tribunal must decide a dispute in accordance with the law of the host state, along with such rules of international law as may be applicable.

- Article 25 provides that jurisdiction of the ICSID Center under whose auspices arbitral tribunals are formed embraces any legal dispute arising directly out of an investment between a Contracting State and a national of another Contracting State which the parties consent to submit.³⁵ 'When the parties have given their consent, no party may withdraw its consent unilaterally.'³⁶ This provision has been authoritatively construed to mean that a State's attempted unilateral rescission of an agreement to submit disputes for resolution by an ICSID tribunal does not impair the tribunal's jurisdiction.³⁷ It may be argued quite reasonably, that what a State or party cannot do directly it cannot do indirectly; that, if it is not entitled to vitiate the arbitral process by withdrawing its agreement to arbitrate, it is not entitled to vitiate the arbitral process by maintaining that the principal agreement containing the arbitral obligation is void or voided.³⁸
- The Arbitration (Additional Facility) Rules of ICSID explicitly provide, in Article 46, paragraph 1:

Objections to Competence:

³⁴ *SPP v Egypt*, Decision on Jurisdiction, 14 April 1988, 3 ICSID Reports 142, the Tribunal refused to accept Egypt's interpretation of its legislation containing an ICSID clause: 'While Egypt's interpretation of its own legislation is unquestionably entitled to considerable weight, it cannot control the Tribunal's decision as to its own competence.'

³⁵ *Ibid*, p446.

³⁶ *Ibid*, p439.

³⁷ Georges R Delaume, State Contracts and Transnational Arbitration, 75 *American Journal of International Law* (1981), pp 785, 788-789.

³⁸ Stephen M Schwebel (Judge of ICJ), Hersch Lauterpacht Memorial Lectures, *International Arbitration: Three Salient Problems*, (Cambridge Grotius Publications Ltd, 1987).

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*(1) The Tribunal shall have the power to rule on its competence. For the purposes of this Article, an agreement providing for arbitration under the Additional Facility shall be separable from the other terms of the contract in which it may have been included.*³⁹

Thus the ICSID Additional Facility Rules expressly embody the doctrine of severability.

- Article 44 of the ICSID Convention provides that the arbitration proceedings are regulated exhaustively by the Convention itself and by the rules adopted under it except as the parties otherwise agree. Thus the parties are the ultimate sovereigns and can control the arbitrator and prevent him from overriding the parties' wishes by importing his own procedural preferences. The idea underlying the rule in Article 44 is that the parties consenting to ICSID arbitration should be fully aware also of the procedural consequences of their decision. Subsequent changes to the Arbitration Rules might not suit them and should not be imposed upon them. Therefore, the Arbitration Rules as they existed at the time of consent are frozen even if they are changed before the institution of proceedings.⁴⁰

Using ICSID would require the host State to agree with the transnational corporation that all investment disputes would be referred to ICSID at the outset of the transnational's investment in the country.⁴¹ ICSID is only available to Contracting States and investors having the nationality of a Contracting State.⁴² Although ICSID has some attractive qualities, such as more certain enforcement of the award (as an ICSID award must be automatically recognized and enforced in all States, party to the Convention) and lower costs and more efficiency compared to litigation,⁴³ its mandate is not suitably tailored to the context of disputes of the likes of industrial disaster.

First, it is uncertain whether addressing compensation and reparation issues in the context of an accident is indeed an 'investment dispute'.⁴⁴ Second, because the consent of the parties to refer to ICSID is required at the outset of the investment, disputes involving other transnational corporations already established within the host State, who did not enter into such agreements, are not included. Third, the process may still

³⁹ Wetter, Vol V, pp 38-39.

⁴⁰ See Introductory Note to the 1968 Arbitration Rules, 1 ICSID Reports 65.

⁴¹ ICSID Convention, Art 25(1).

⁴² Ibid. As of June 1989, 98 states have signed the Convention, and 91 have ratified.

⁴³ Stephen J Toope, *supra* note 26. It takes an average of two and a half to three years to complete an ICSID arbitration. Ibid.

⁴⁴ See ICSID Convention, Art 25(1).

be too slow.⁴⁵ Fourth, it remains questionable how well ICSID, a 'Western' institution, using whatever chosen substantive law, would respond to the expectations of the victims with regards to the amount of the award. Finally, the greatest disadvantage in using an international institutional arbitration process is that, besides the transnational corporation, the host state is the only capable party to the dispute. Consequently, the host state must espouse the individual claims of the victims.

Thus far, the assumption has been that an international dispute involving an environmental disaster is a mixed one: the parties being the transnational corporation and the State. Technically, however, it is principally a dispute between private parties: the transnational corporation and the victims.⁴⁶ As has been emphasised, however, limiting the participation of the host State in the dispute is very desirable. Given its inherent parameters, it does not seem that a mixed international institutional arbitration is the best way to settle a dispute.

Due process

If an ICSID tribunal is to operate like all arbitral tribunals, it must guarantee a number of principles that constitute the procedural magna carta of arbitration. This magna carta has two main principles:

- a) due process⁴⁷ and fair hearing and
- b) independence and impartiality of arbitrators.

Compliance with this magna carta ensures that the proceedings are conducted in a legitimate and fair manner. This is necessary due to the legal nature of the arbitration process. The ICSID award has the same finality and binding effect as a judgment of a national court. As all States party to ICSID must enforce all awards, without prior scrutiny, it is necessary that the arbitration proceedings and the arbitrators meet certain minimum standards considered indispensable to any trial. This is very important in ICSID arbitration as investor-state arbitration in general suffers from the reputation of being a secretive and non-democratic process.

⁴⁵ Two and a half to three years is hardly a desirable amount of time in which to compensate the victims of an environmental disaster. See *id.*

⁴⁶ Although the state may have a claim in damages due to the amount of resources it expended in treating the victims and cleaning up the site.

⁴⁷ Due process means being given proper notice of the appointment of the arbitrator or of the arbitration proceedings and being given full/adequate opportunity to present one's case. See ICSID Convention, Art 45.

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Indian consideration

ICSID's use has risen in parallel to the increase in international capital flows, particularly foreign investment. However, some countries such as Brazil and India, which attract the largest amount of foreign investment, are not involved in ICSID. China only ratified in 1993.⁴⁸ India refrained from being a part of the ICSID as it felt it would entail conceding sovereign space.⁴⁹ In the 60s when the Convention came into force, India was not economically developed and not much international trade and investments were conducted. As a reason India kept out of the Convention.

It is hoped that the developing countries accepting ICSID jurisdiction would give investors confidence to continue with and make further investments in such countries and foster confidence between States and foreign investors conducive to increasing the flow of private international investment. In consequence of this, in recent times, there has been an increase in the number of cases referred to the ICSID. Over 70 cases have been registered by the ICSID.⁵⁰

The above developments reflect the importance this Institution, and India, being at its economic peak, cannot afford to restrict its international transactions with rigid redressal mechanisms. At this point it is relevant to note that India is a member, however, of the New York convention. But the advantage that ICSID has over the New York Convention is that the awards of ICSID may not be challenged. ICSID also has other advantages of not functioning according to the willingness of the parties to cooperate. An unwilling party cannot deter the arbitration unlike other arbitral procedures as this shortcoming is cured by either conducting the process by substitution or even proceed with the hearing and the award in the absence of this party.

ICSID is a specialised institution in dealing with investment disputes. This kind of arbitral process not only eliminates the barrier of nationality but also guarantees high competency in investment and trade matters. There are also few disadvantages of ICSID which may be what India might have considered as reason for not joining the Convention. ICSID awards cannot be challenged except on limited grounds. No

⁴⁸ *Supra* note 24.

⁴⁹ Editorial, Economic Times, <http://economictimes.indiatimes.com/News/Economy/Foreign_Trade/New_Delhi_plans_to_join_Investment_Disputes_Convention/articleshow/3478075.cms> visited on August 29, 2009.

⁵⁰ Christoph Schreuer, The ICSID Convention: A Commentary, available at <<http://www.dundee.ac.uk/cepmlp/journal/html/schreuer.html>> visited on August 27, 2009.

government has the right to challenge the award before its local court.⁵¹ In spite of this an unsatisfied party can initiate annulment proceedings.

With the increase in the number of international investment transactions such as takeovers, buyouts, joint ventures with overseas companies and strategic investments there is a need to reach a consensus about the international dispute settlement forum as it would make international contracts flexible and party friendly. It opens up opportunities and offers better negotiations in international contracts. Foreign investment is beneficial to host states and serves as a catalyst in improving the level of wealth of the economy. As such, it flows from this premise that such investment should be protected through the provision of investment protection mechanisms including international dispute resolution. Hence there is no rationale in, India not signing the ICSID considering the nation is witnessing unprecedented proliferation in trade and investment.

Conclusion

The Washington Convention was indeed a significant development towards establishing a system under which individuals and corporations could demand redress directly against a foreign State, by way of conciliation or arbitration. When the Convention was opened for signature in the mid-1960s, it was hailed as a great achievement of World Bank diplomacy and innovative thinking in the pursuit of increased international investment for development.⁵² The arbitration capacities of the Centre have been major factors behind its success as a deterrent to investment disputes, its settlement record (approximately 50% of the cases registered with ICSID have settled before going to arbitration).⁵³

Elaborating on the reason for the establishment of ICSID, Ibrahim Shihata, the then Secretary General of ICSID stated that ICSID should not be viewed merely as a mechanism of conflict resolution. It should be regarded as a valuable instrument of international public policy which is meant in the final analysis to secure a stable and increasing flow of resources to developing countries under reasonable conditions.

The ICSID attempts to give private parties a place in international economic relations and access to international dispute resolution. This enables private investors to feel

⁵¹ <<http://www.mallesons.com/publications/update/2005/8151043w.htm>> visited on August 26, 2009.

⁵² Schreuer, *The ICSID Convention: A Commentary*, (Cambridge, United Kingdom, 2001).

⁵³ Lecuyer-Thieffry & Patrick Thieffry, 'Negotiating Settlement of Disputes Provisions in International Business Contracts: Recent Developments in Arbitration and other Processes', 45 *BUS LAW* 577 (1990).

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safe in their dealings with host countries and the host countries are assured of the absence of international politics in their commercial relations with private investors. The dramatic increase in foreign investment flows and the proliferation of investment treaties referring to ICSID's dispute settlement facilities demand the necessity of giving a serious thought to being party to the Convention. Bearing in mind the ever-expanding realms of investment and trade in the present scenario of international trade, India needs to consider membership of the Washington Convention.