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Case studies in ADR

Resolving investment disputes through ICSID

Richard Lightfoot and **James Nicolaides**

This article provides a general overview of the International Centre for Investment Disputes (ICSID or the Centre) and its role in the settlement of 'investment' disputes between hosts states and foreign investors. Given the proliferation of bilateral and multilateral investment protection treaties, private investors and state parties are increasingly seeking direct recourse to international arbitration to settle claims.

The ICSID is an institution of the World Bank and was founded in 1966 under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention[1]). As of 30 June 2006, 155 states had signed the ICSID Convention with 143 of those states having deposited their instruments of ratification. Australia signed the ICSID Convention in 1975 and it entered into force in 1991.[2]

Constitution

The ICSID Convention is a self-contained system and is entirely removed from domestic court systems. ICSID arbitration is conducted in accordance with the provisions of the ICSID Convention, and the rules and regulations adopted by it.

Domestic courts have no power to review the decisions, with the right of appeal from a decision limited to those specified in the convention and by the ICSID itself.[3] However, domestic courts must, on the presentation of a certified award, enforce the obligations imposed by the award as if it were a final judgment.[4] Parties may seek interim orders from a domestic court in limited circumstances if they have already expressly agreed to allow for this in the instrument incorporating their submission to ICSID arbitration.[5]

Procedure

A foreign company must request ICSID arbitration before the ICSID will become involved in a dispute. Before a request can be made for the ICSID to arbitrate the conditions listed in Table 1 must be satisfied.

Jurisdiction

The ICSID has jurisdiction over any 'legal dispute' directly relating to an 'investment' between a 'contracting state' (including an agency of the state designated to the ICSID by that state)[6] and a national of another contracting state, where the parties submit in writing to the Centre.

Particular points to note are that:

- Any 'legal dispute' must be related to a claim on the basis of a legal right and that the ICSID does not issue advisory opinions.
- The dispute must arise directly out of an investment within the permissible subject matter[7] and that the ICSID Convention was not designed to deal with disputes arising out of ordinary sales contracts.
- Constituent subdivisions or an agency of the contracting state must be designated to the ICSID by the contracting state and if the state has approved the subdivision or agency's expression of consent.[8]
- ICSID was not established to permit a national to arbitrate with its own government. Locally incorporated foreign subsidiaries may be treated by the parties to agreement as a national of another contracting state for the purposes of the convention.[9]
- The parties to a dispute must have consented in writing to submit the dispute to ICSID and once the parties have given their consent neither party may withdraw its consent unilaterally. A host state may offer to submit disputes to ICSID subsequent to a treaty which an investor may accept by submitting and filing a request for arbitration with the centre.[10]
- In contrast to an ICC or UNCITRAL Rules arbitration where the choice of place of arbitration will constitute the choice of procedural or the curial law

Table 1: Necessary pre-conditions for arbitration by ICSID

1. The parties must have expressly agreed to submit to the ICSID	This is usually achieved by having the dispute resolution clause in the contact refer to ICSID in the event of arbitration. In the case of a bilateral investment treaty (BIT) the governments of the parties will have incorporated an understanding that disputes between the government of a member country and a private investor of another member country can be submitted to ICSID for arbitration. In the case of the Australia–United States Free Trade Agreement the complaining party may select the forum in which to settle the dispute. See Australia–United States Free Trade Agreement, Article 21.4 : Choice of Forum, available at <www.dfat.gov.au/trade/negotiations/us_fta/final-text/chapter_21.html>.
2. The dispute must be between the contracting state and a national of another contracting state	The investor must be a foreigner or in the case of a local subsidiary the parties may agree in advance that it is treated as a foreign investor.
3. The dispute must arise out of an 'investment'	The ICSID Convention does not define what constitutes an investment but the relevant investment treaty may contain a definition. In the absence of a definition the tribunal may make a determination.

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of the proceedings, an ICSID arbitration is conducted in accordance with international law, the ICSID Conventions, its rules and regulations and not national law.

The claim

First the claimant must lodge a 'Request for Arbitration' with the ICSID, which is subject to registration by the Secretary General using the 'screening power'.[11] The Secretary General's decision on registration cannot be challenged by appeal and potential respondents cannot object to jurisdiction as that is left for the Tribunal to determine.

After the Request for Arbitration is registered, the respondent files a 'no answer' which is followed by a pre-trial conference among the parties and the Tribunal.[12] The claimant will then file a memorial that includes all documents and evidence that they intend to rely on and the respondent will file a counter-memorial including documents and evidence in response to the claim.

This written phase of the proceedings is followed by a hearing where oral argument is presented.[13]

Enforcement

The enforcement of an ICSID award is contingent on a national court recognising an arbitral award as a binding court judgment.

The New York Convention[14] applies: the contracting state parties to the ICSID Convention are bound by Article 54 of the ICSID Convention, upon presentation of a copy of the award certified by the Secretary General of ICSID. The contracting states must recognise the award as binding and enforce the obligations imposed by the award as a final judgment.

In the event of non-compliance by the contracting state voluntarily, the parties may resort to such measures as attachment of assets in execution of the award pursuant to the laws of execution of judgments in the state whose territory execution is sought.[15]

Case study: Bayindir v Pakistan

The ICSID case of *Bayindir v Pakistan*[16] highlights some of the arguments that are made in satisfying or denying claims on the basis of jurisdiction of the ICSID under Article 25 (1) of the ICSID Convention.

Facts

The parties to the dispute entered into an agreement for the construction of a six-lane motorway and ancillary works known as the Pakistan Islamabad-Peshawar Motorway (M1 Project). The claimant Bayindir asserted frustration of the contact due to omissions on the part of Pakistan (in particular delays in the construction work resulting from the late handover of the land by Pakistan).

The ensuing dispute remained unsettled with the Pakistani army eventually surrounding the site and Bayindir's personnel evacuated. Following this the National Highway Authority (NHA), a Pakistani Public Corporation concluded a contract with M/s Pakistan Motorway Contractors Joint Venture (PMC JV) providing for the completion of the contract.

A constitutional challenge against notice of termination served by NHA before the Lahore High Court was dismissed on the ground that the Contract contained an arbitration clause. Accordingly NHA served notice of arbitration and sought Bayindir's concurrence in the appointment of a sole arbitrator.

On 10 April 2003 Bayindir informed NHA that it had already submitted the matter to ICSID jurisdiction. Current domestic proceedings remained stayed following the ICSID Tribunal Procedural Order that Pakistan took steps to ensure that NHA did not enforce any final judgment it may have obtain from the Turkish Courts.

Arguments on jurisdiction

Bayindir advanced the following four main contentions:

- It had made an 'investment' under both the BIT and the ICSID Convention.
- Under the BIT breaches of the treaty provisions on national and most favoured nation treatment, fair and equitable treatment and expropriation without compensation.
- Treaty claims were distinct and autonomous from claims arising out of the contract and as an independent argument, the Tribunal also had jurisdiction over the contract claims.

Pakistan advanced the following main arguments:

- Bayindir had not made an investment within the meaning of the BIT or the ICSID Convention.
- Bayindir's claims of alleged breach of contract were governed by the Law of Pakistan and NHA was a separate legal person distinct from Pakistan. Consequently the Tribunal had no jurisdiction with respect to the contract claims as the breaches were not attributable to Pakistan.
- Bayindir's claims on alleged breach of the BIT were solely for the purpose of expediency and were an abuse of process.
- The Tribunal could not exercise its jurisdiction in relation to treaty claims while claims for breach of contract were to be settled under another forum.
- Bayindir's treaty claims were distinct from alleged breach of contract claims, had 'no colourable basis' and were insufficient for the tribunal to assert jurisdiction.

Conclusion of the Tribunal

Had Bayindir made an investment?

In determining whether Bayindir had made an investment within the meaning of the BIT, the Tribunal followed the decision in *Salini v Morocco* where it held that the provision, that is the requirement of conformity with local laws, referred to the validity of the investment and not to its definition,[17] with a general definition that investment 'shall include every kind of asset' provided for in Article 1(2) of the BIT.

The Tribunal agreed with Bayindir and their proposition that the definition could include contributions in terms of know-how, equipment, personnel and financing. On the facts of the case the Tribunal found that the scale of Bayindir's contribution had clear economic value within the meaning of 'every kind of asset' in accordance with the BIT.

With respect to financial contribution, the Tribunal dismissed Pakistan's contention that part of the price paid in advance was of itself and had no bearing on the existence of a financial contribution and further that their contention had overlooked the fact that

Bayindir had provided bank guarantees equivalent to the advance.

Was Bayindir's treaty claim in reality a contract claim?

Pakistan submitted that Bayindir's treaty claims were inextricably bound up with the contact and thus beyond the scope of the Tribunal's jurisdiction. In response Bayindir relied on the 'precedent' in the *Impregilo*[18] case where the Tribunal held, inter alia, that despite the fact that the BIT did not endow the Tribunal with jurisdiction to consider Impregilo's contract claims it did not imply that the Tribunal had no jurisdiction to consider Treaty claims against Pakistan which at the same time could constitute breaches of Contract.[19]

The Tribunal held that the present case was not a case where the essential basis of the claims were purely contractual and were not prepared to depart from the principle of the independence of treaty and contract claims as was previously expressed in the case of *Vivendi*.[20]

The Tribunal concluded that where the investor has a right under both the contract and the treaty, it has a self-standing right to pursue the remedy accorded by the treaty. The very fact that the amount claimed under the treaty is the same as the amount that could be claimed (or was claimed) under the contract does not affect such self-standing right.[21]

Was Bayindir's treaty claim sufficiently substantiated for jurisdictional purposes?

In accordance with accepted international standards (and general national) practice, the Tribunal declared that Bayindir had the burden of proving the facts it asserted and that the claims fell within the Tribunal's jurisdiction in accordance with the relevant standard with respect to the breaches of the BIT.

In Bayindir's 'most favoured nation' (MFN) claim it contended that it was not given equal treatment equivalent to the best treatment accorded to a comparable Pakistani or third country investor, alleging that it was compelled to save costs and for reasons of local favouritism.

In response, Pakistan contended that MFN claims were predominantly about preferable regulatory treatment that favoured the local investor and not the exercise of discretion where no legal obligation existed in particular in contractual matters.

The Tribunal disagreed with Pakistan and was prepared to examine the facts alleged by the broad wording of the MFN clause of the BIT which was not limited to 'regulatory treatment'.

The Tribunal examined three Pakistani newspaper articles that reported that:

Pakistani construction companies would now complete the project, for economic reasons the Prime Minister had intervened in the execution of the project and that Islamabad would save hundreds of millions of dollars on the project by using local construction firms.

The Tribunal said that irrespective of the evidentiary weight of these reports on the merits, they considered that they constituted a prima facie basis for the purpose of establishing jurisdiction. Further, the Tribunal concluded that awarding an extended timetable to the local investor to complete the project fell within the MFN provisions of the BIT and Bayindir's assertion that Pakistan had failed to ensure fair and equitable treatment of their investment and unfair motives of expulsion provided further grounds for a treaty claim.

Regarding expropriation, the Tribunal's position was reinforced by the unchallenged fact that Bayindir's equipment was retained on the site following the expulsion.

Conclusion

With the proliferation of bilateral and multilateral investment treaties, the ICSID is an essential institution central to the arbitration of disputes that provide for its jurisdiction.

A common theme in recent litigation stems from investment in developing nations that often lack the domestic legal institutions to deal with foreign investment disputes. An ICSID arbitration clause in a BIT provides security for a private investor who can rely on an independent and enforceable resolution to an investment dispute with a host nation. ●

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Endnotes

1. Also called the Washington Convention.
2. ICSID Annual Report (2006) p 12, available at <www.worldbank.org/icsid/pubs/1998ar/ICSID_AR_06_ENG_CRA2.pdf>.
3. ICSID Convention, Article 53.
4. ICSID Convention, Article 54.
5. ICSID Convention, Article 39(5).
6. ICSID Convention, Articles 53 and 54.
7. In *Enron Corporation v The Argentine Republic* (ICSID Case No ARB/01/03), the Tribunal wrote: '60. The Tribunal has noted above that the right of the Claimants can be asserted independently from the rights of TGS [the local project company] or CIESA [an intermediate holding company]. As the Claimants have a separate cause of action under the Treaty in connection with the investment made, the Tribunal concludes that the present dispute arises directly out of the investment made and that accordingly there is no obstacle to a finding of jurisdiction on this count.'
8. ICSID Convention, Article 25(1) and (3).
9. ICSID Convention, Article 25(2) (b).
10. *See Asian Agricultural Products Ltd v Sri Lanka,* ICSID Case No ARB/87/3, Award (27 June 1990), 6 ICSID Rev-FILJ 526 (1991).
11. ICSID Convention, Article 36(2).
12. ICSID Arbitration Rule 20.
13. ICSID Arbitration Rule 32.
14. Convention on the Recognition and Enforcement of Foreign Arbitral Awards.
15. ICSID Convention, Article 25.
16. *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan* (ICSID Case No ARB/03/29)
17. *Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco*, ICSID Case No ARB/00/4, Decision on Jurisdiction of 23 July 2001, 20 as

translated in 42 ILM 609 (2003); also available at <www.worldbank.org/icsid/cases/salini-decision.pdf>.

18. *Impregilo SpA v Islamic Republic of Pakistan*, ICSID Case No ARB/03/3, Decision on Jurisdiction, 22 April 2005, ¶ 108; available at <www.worldbank.org/icsid/cases/impregilo-decision.pdf>. In *Impregilo*, Pakistan submitted that 'the treaty claims [t]here c[ould] not be separated from the contract claims and that, consequently, such claims fall outside the scope of the BIT and this Tribunal has no jurisdiction over them'.

19. Above note at p 258.

20. *Compañia de Aguas del Aconquija SA and Vivendi Universal (formerly Compagnie Générale des Eaux) v Argentine Republic*, Decision of Annulment, 3 July 2002, ¶ 60; ICSID Review (2004), vol 19, No 1, 41 ILM 1135 (2002), also available at <www.worldbank.org/icsid/cases/vivendi_annul.pdf>.

21. *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan* at p 48.

ADR Diary

- The **Australian Centre for Peace and Conflict Studies (ACPACS)** are running a 4-day intensive mediation seminar in **Brisbane**. Participants will learn and practise the process, principles, skills and interventions used by professional mediators. During the course mediation simulations are conducted under the supervision of experienced mediation coaches. For more information, contact <mediate@uq.edu.au> or visit <www.uq.edu.au/acpacs>.
- **ACPACS** are also running a 2-day advanced mediation course in **Brisbane** from 26–27 September. The course is skills focused and has CPD approval by the Bar Association of Queensland.
- **ACPACS** will also conduct a 3-day intensive International Commercial Arbitration course in **Brisbane**. The course will introduce participants to the law and practice of international commercial arbitration, discuss international documents and treaties, such as the UNCITRAL Model Law on International Commercial Arbitration, and cover the recognition and enforcement of foreign arbitral awards. It focuses on practical aspects of international arbitration. The programme is accredited by the Chartered Institute of Arbitrators in London. Participants who complete the course can apply to become Associate Members (ACIArb) of the Institute. In addition a certificate of attendance is provided by ACPACS.
- The **Bond University Dispute Resolution Centre (BUDRC)** is running 4-day Basic Mediation Courses on the **Gold Coast** from 26–29 July and 29 November–2 December. They are also running a 4-day Basic Mediation Course in conjunction with the **Leo Cussen Institute** in **Melbourne** from 18–23 December.
- **BUDRC** are also running an **Advanced Mediation Course** on the Gold Coast from 13–16 September. **Family Dispute Resolution Practioner Workshops** are being held on 30 July and 3 December on the Gold Coast and 22 October in Melbourne. For more information on courses, visit <www.bond.edu.au/study-areas/law/centres/drc/drc.html>.
- The **Australian Commercial Dispute Centre (ACDC)** will be holding a one-day workshop in **Sydney** on 12 September 2007. The workshop will include foundation skills and information to handle conflicts and disputes. It is also an opportunity for participants to prepare themselves for the ACDC Mediation Course (see below). For more information or to reserve a place, visit <www.acdcltd.com.au>.
- The **Australian Commercial Dispute Centre (ACDC)** will also be holding 4- and 5-day Mediation workshops that incorporate activities, practice, coaching and an optional accreditation assessment day. The first will be held in **Melbourne** on 20–24 August 2007 and the second in **Sydney** on 17–21 September 2007. For more information, visit <www.acdc.ltd.com.au>.
- **LEADR** Association of Dispute Resolvers will be holding 4-day mediation training sessions in Australia and New Zealand. These courses are open to individuals who are keen to add mediation to their professional skill set, in addition to those who are engaged in dispute resolution on a daily basis. Australian courses will take place in **Sydney** on 8–11 August and 7–10 November; in **Adelaide** on 12–15 September; in **Melbourne** on 17–20 October; in **Brisbane** on 31 October–3 November; in **Canberra** on 1–4 August; and in **Perth** on 17–20 October. New Zealand courses will take place in **Auckland** on 7–10 November; and in **Christchurch** on 22–25 August. Early registration is recommended and can be done at <www.leadr.com.au>.
- The **Trillium Group** will be holding a 4-day Negotiation and Mediation workshops. The workshops will be centred on the concept of principled negotiation and will be held in **Melbourne** on 25–28 September and in **Perth** on 21–24 August. For more information or to register, visit <www.thetrilliumgroup.com.au>.

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