The World Bank/ICSID Dispute Settlement Procedures

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The Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention)[1] entered into force in 1966. The underlying idea is to provide facilities for the settlement of investment disputes in the form of conciliation and arbitration thereby furthering the investment climate in developing countries.

ICSID arbitration and conciliation are available, in principle, to host States that are Contracting Parties to the ICSID Convention and to investors whose States of nationality are Contracting Parties. In 1978 the Administrative Council of ICSID created the Additional Facility. It is available, *inter alia*, if only one of the States concerned is a party to the Convention.

Under the terms of the ICSID Convention the dispute must arise directly out of an investment. Practice on the existence of an investment under the Convention has been rather flexible. For instance, public loans have been held to constitute an investment.[2]

Access to the dispute settlement facilities of the ICSID Convention is not automatic but depends on written consent by both sides, that is the host State and the foreign investor. This consent can be given in one of three ways. The most obvious way is a consent clause in a direct agreement between the parties. Dispute settlement clauses referring to ICSID are very common in contracts between States and foreign investors. ICSID has prepared and published a set of Model Clauses to facilitate the drafting of these contracts.

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[1] UNTS, 575 (1966), p. 159; ILM, 4 (1965) p. 532;

[2] See esp. Fedax N. V. v. Venezuela, Decision on Jurisdiction, 11 July 1997, ILM, 37 (1998) p. 1378.

Another technique to give consent to ICSID dispute settlement is a provision in the national legislation of the host State, most often its investment code. Such a provision offers ICSID dispute settlement to foreign investors in general terms. Many capital importing countries have adopted such provisions.[3] The investor may accept the offer in writing at any time while the legislation is in force. In fact, the acceptance may be made simply by instituting proceedings. [4]

The third method to give consent to ICSID jurisdiction is through a treaty between the host State and the investor's State of nationality. Most bilateral investment treaties (BITs) contain clauses offering access to ICSID to the nationals of one of the parties to the treaty against the other party to the treaty.[5] The same method is employed by a number of regional multilateral treaties such as the NAFTA [6] and the Energy Charter Treaty. [7]

Once consent to jurisdiction has been given it cannot be revoked unilaterally.[8] An attempt to terminate a contract containing an ICSID clause will not oust ICSID's jurisdiction. Neither will the repeal of legislation providing for consent affect jurisdiction provided the offer has been accepted while the legislation was still in force.

The Convention stipulates a general "exclusive remedy rule".[9] This means that once consent to ICSID arbitration has been given, a party may no longer resort

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[3] For a broad overview see A. R. PARRA, Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment, ICSID Review - Foreign Investment Law Journal, 12 (1997) p. 287.
[4] For a case in which jurisdiction was based on national legislation see SPP v. Egypt, Decisions on Jurisdiction, 27 November 1985, 14 April 1988, ICSID Reports, 3 (1995) pp. 112, 131.
[5] See especially R. DOLZER, M. STEVENS, Bilateral Investment Treaties, 1995, pp. 129-156. For a case in which jurisdiction was based on a BIT see AAPL v. Sri Lanka, Award, 27 June 1990, ICSID Reports, 4 (1997) p. 246.
[6] Art. 1122, ILM, 32 (1993) pp. 605, 644.
[7] Art. 26, ILM, 34 (1995) pp. 360, 399.
[8] Art. 25 (1) of the Convention.
[9] Art. 26 of the Convention.

to another remedy. Unless the parties have agreed otherwise, domestic courts are no longer available for disputes that have been submitted to ICSID arbitration. Even the venerable principle of requiring the exhaustion of local remedies has been abandoned in favour of direct access to ICSID arbitration unless the parties preserve that principle. In practice, this hardly ever happens.

ICSID arbitration is also insulated from interference by domestic courts. Domestic courts may not issue orders to stay ICSID proceedings or intervene in any other manner. Even provisional measures taken to preserve the rights of the parties pending the outcome of ICSID proceedings have to be recommended by the tribunal.[10] Provisional measures by domestic courts are only allowed in the unlikely case that the parties have so stipulated in their consent agreement.

In fact, ICSID arbitration is entirely self-contained and independent of national law. The parties are free to choose the law applicable to the merits. [11]As for procedure, it is governed by the Convention and by the Arbitration Rules adopted under it. [12]The place of the arbitration is irrelevant for the procedure and for the enforcement of awards.

ICSID arbitration is also insulated from political interference in the form of diplomatic protection. Once consent to jurisdiction has been given, the investor's State of nationality looses its right to diplomatic protection against the host State. [13]The guarantee against diplomatic protection constitutes a strong incentive to host States to submit to ICSID arbitration.

One of the traditional problems of international adjudication and of arbitration in particular has been the noncooperation of a party leading to the breakdown of

[10] Art. 47 of the Convention.
[11] Art. 42 of the Convention.
[12] Art. 44 of the Convention.
[13] Art. 27 of the Convention.

the process. ICSID arbitration provides a safety net at every juncture of the proceeding should cooperation break down.

The parties may agree on the composition and constitution of a tribunal, but if they do not the Convention offers precise guidance. In particular, if a party fails to appoint arbitrators, the Chairman of ICSID's Administrative Council will make the necessary appointments. [14]

Failure to appear or to present a case will not derail the proceedings. [15] The cooperating party may request the tribunal either to discontinue the proceedings or to render an award. Before rendering an award the tribunal must give the defaulting party a period of grace unless it is convinced that there is no intention to cooperate. In addition, the tribunal may impose a sanction on the noncooperating party in its decision on the cost of proceedings.

An award is final and binding and not subject to any review extraneous to the Convention. [16] Compliance with ICSID awards is facilitated by the strong institutional link of the Centre to the World Bank. Most States will find it unwise to jeopardize their good standing with the Bank through noncompliance with an ICSID award. Failure to comply would also lead to a revival of the right to diplomatic protection by the investor's State of nationality. [17]

The Convention also provides a unique procedure for enforcement. Awards are to be recognized and enforced in all States parties to the Convention like final judgments of the local domestic courts.[18] This feature of the Convention gives ICSID awards a distinctive advantage over other foreign or international arbitral awards. The ICSID Convention offers a system of automatic enforcement that is

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[14] Art. 38 of the Convention. See AGIP v. Congo, Award, 30 November 1979, ICSID Reports, 1 (1993) p. 310.
[15] Art. 45 of the Convention.
[16] Art. 53 of the Convention.
[17] Art. 27 of the Convention.

not subject to any review of the award at the stage of enforcement. Under the ICSID Convention the obligation to recognize and enforce is incumbent upon each Contracting State. Therefore, an award creditor may legitimately seek enforcement in the State that offers the most promising prospects notably where assets of the award debtor are located.

The equalization of ICSID awards to final domestic judgments implies that the rules on sovereign immunity from execution continue to apply. In fact, the Convention specifically states that the rules on immunity from execution will remain unaffected.[19] In practical terms, this will usually mean that property in use for or intended for use for commercial purposes will be open for execution. Property designated for public purposes will not be subject to execution.

Settlement of disputes under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States offers a high degree of effectiveness and security to foreign investors. Therefore, the assurances offered by the ICSID Convention are an important element in the vastly improved climate for foreign direct investment that has developed over the last two decades. The role of FDI for development is practically uncontested today and has been recognized by nearly all developing countries. Therefore, the Convention' s original idea, the promotion of economic development through FDI, has turned out to be a clear success.

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[18] Art. 54 of the Convention.
[19] Art. 55 of the Convention.