Regulation and infrastructure of international commercial arbitration

Section D: Investment arbitration and specialist arbitration

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with the assistance of J.D.M. Lew

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Introduction

Foreign investment is increasingly an integral part of the world economy. In developing countries, major infrastructure projects and the exploitation of natural resources often require financing by and technical know-how of private foreign investors. The investment may be considerable and may need years for the investor to recover.

In developing countries foreign investment often relates to core components of the national economy. These factors make foreign investment particularly vulnerable to possible interference by the host state. While clear-cut nationalisations are rare there are a number of other measures of a lower threshold which may affect foreign investment, such as:

- currency restrictions preventing repatriation of profits
- prohibitions on price increases
- tax increases or new taxes
- environmental legislation.

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. Although this effort has finally failed, there are a number of regional or bilateral treaties which aim to promote and protect foreign investment, including:

- the North American Free Trade Agreement
- the Energy Charter Treaty.

In order to encourage foreign investment some countries have implemented specific investment laws to provide the necessary legal certainty sought by investors. Investment protection legislation can be found in nearly all the countries of the Commonwealth of Independent States and most developing countries. In these efforts to promote and protect investment the issue of dispute resolution has been of crucial importance. Investors usually have little faith in the courts of the host country and states will not typically submit to the jurisdiction of foreign courts.

For these reasons arbitration has played a prominent role in the settlement of investment disputes. *Ad hoc* arbitration proceedings in the aftermath of the expropriation of oil concessions have greatly

contributed to developing and shaping the laws on investor protection.

Most of the international conventions provide for arbitration as the preferred method of dispute settlement. In general they either provide for *ad hoc* arbitration under the UNCITRAL rules or under the rules of an acceptable arbitration institution. For example:

- the ICC
- the SCC
- (in particular) the ICSID.[1]

This chapter provides a brief overview of:

- the special features of investment disputes
- dispute settlement under national investment laws
- dispute resolution systems in bilateral investment treaties
- NAFTA
- the Energy Charter Treaty
- ICSID as the natural forum for investor-state disputes and the conduct of arbitration proceedings under the ICSID Convention and Arbitration Rules
- the ICSID 'Additional Facility' Rules.

[1] For an overview see Parra, 'Provisions on the settlement of investment disputes in modern investment laws, bilateral investment treaties and multilateral instruments', 12 *ICSID Rev-FILJ* 287 (1997).

Learning outcomes

By the end of this chapter and the relevant readings you should be able to:

- be familiar with the peculiarities of investment arbitration
- have an introduction to ICSID arbitration
- have an introduction to BIT arbitration
- be aware of other investment treaty arbitration systems.

Essential reading

- Lew, Mistelis and Kröll, chapter 28.
- http://ro.unctad.org/disputesettlement/index.htm (and then the specific chapters on investment arbitration – ICSID and NAFTA).

3.1 Special features of investment disputes arbitration

Investment disputes differ in several respects from ordinary commercial disputes. Frequently the amount in dispute is remarkable and the issues may have considerable political implications. Disagreements often concern:

- the objectives of the investment
- the repatriation of revenues
- the ultimate control and benefit of the investment.

The investment may relate to vital infrastructure the completion of which is of significant importance for the national economy. The outcome of the dispute may also affect the general investment climate in a country. In addition one party is a state vested with

sovereign powers which is nevertheless in need of foreign investment and is bound by international instruments.

These factors influence the conduct of the arbitration in various respects. In the composition of the tribunal the nationality of the arbitrators may become a more important issue than in ordinary commercial arbitrations. Concerning the applicable substantive and procedural laws there is a much stronger tendency to delocalise and apply principles of international law. Investment disputes can have a greater impact on parties other than those involved and thus may be more in the public domain. Investment disputes may relate to legislation which not only affects a specific investor, but also:

- a complete class of investors
- the relationship between the host state and the investor's home state.

There is also greater public interest in investment arbitration and this is also evidenced by the policy adopted in relation to the publication of awards, which is much more liberal than in commercial arbitration.

The power of an investment dispute arbitration

The greatest difference to commercial arbitrations is the source of the tribunal's power. Commercial arbitrations require an arbitration agreement between the parties. By contrast, in investment disputes arbitration may also be possible without such an arbitration agreement in the ordinary sense. National legislation or treaties may give each party the right to initiate arbitration proceedings against the other. There may even be no contractual relationship between the parties at all, which has led to labelling investment arbitration 'arbitration without privity'.[2]

Investment arbitrations are frequently based:

- on provisions in national investment protection laws
- on international treaties by which the state agrees generally to arbitrate investment disputes.

These provisions constitute a unilateral standing offer to the public to submit to arbitration with any party fulfilling the requirements. The offer is accepted by the investor when it initiates arbitration proceedings against the state.[3] Until that time the investor is not bound to arbitrate and the state cannot initiate proceedings against the investor.

[2] See Paulsson, 'Arbitration without privity', 10 *ICSID Rev-FILJ* 232 (1995); Werner, 'Arbitration of Investment Disputes: The first NAFTA award – introductory comments on the ethyl corporation case', 16(3) *J Int'l Arb* 139 (1999); see for example ICSID, case ARB/97/3, Award of 21 November 2000, *Compañía de Aguas del Aconquija, SA & Compagnie Générale des Eaux (now Vivendi Universal)* v *Argentine Republic*, 40 ILM 426 (2001).

[3] Cremades, 'Arbitration in investment treaties: public offer of arbitration in investment protection treaties', in Briner, Fortier, Berger and Bredow (eds), *Liber amicorum Böckstiegel*, 156 *et seq*. For a detailed analysis of the differences see Wälde, 'Investment arbitration under the Energy Charter Treaty – from dispute settlement to treaty implementation', 12 *Arb Int* 429 (1996) 434 *et seq*.

3.2 National investment laws

Many states have adopted investment protection laws. Their objective is to provide an investor-friendly environment and attract foreign investment by guaranteeing certain minimum standards including:

- national treatment
- no discrimination
- no expropriation without fair compensation.

These national laws usually provide for arbitration as a means of dispute settlement.[4]

Unlike bilateral or multilateral treaties, the provisions contained in national investment protection laws generally extend to all foreign investors. Such provisions may in effect contain an open offer to arbitrate disputes with the foreign investor. Nevertheless states have in several cases challenged the jurisdiction of tribunals in arbitration proceedings initiated on the basis of investment protection laws.

[4] The report of the Executive Directors of the World Bank accompanying the 1965 ICSID Convention refers in para.24 to the provisions in national investment legislation as one possible way to submit to the jurisdiction of the Centre. For an overview of provisions found in national investment laws see Parra, 'Provisions on the settlement of investment disputes in modern investment laws, bilateral investment treaties and multilateral instruments', 12 *ICSID Rev-FILJ* 287 (1997) 314.

3.3 Bilateral investment treaties

Bilateral investment treaties (BITs) have proliferated over the last three decades and are an effective and well-used mechanism to guarantee protection of foreign investments.

In addition to substantive rules they usually contain dispute resolution provisions for certain defined categories of investments. They also invariably provide for arbitration. The scope and the content of these clauses differ considerably, depending on the states involved and their respective bargaining power.

In the majority of cases they constitute a unilateral offer by the state involved to all investors from the other state party to settle disputes by arbitration. Some, however, only contain declarations of intent to make such offers in the future.[5]

Some BITs provisions cover all types of disputes under a very wide definition of investment. Others only cover certain types of disputes. For example, those relating to expropriation or specific types of investment.[6]

Often the exhaustion of local remedies is made a prerequisite for the right to arbitration.

Differences not only exist in the scope of investor protection provided in each BIT, but the type of arbitration provided for will also vary. Frequently the clauses provide for ICSID arbitration or give the investor a choice between ICSID and other institutions such as the ICC, the AAA or the SCC. Often arbitration is the final stage in a multi-tier dispute resolution clause, providing first for negotiations or other diplomatic efforts to settle the dispute amicably.[7] There have been numerous arbitration proceedings which are based on provisions in BITs.[8]

Many pending investment arbitration proceedings derive jurisdiction from BITs. A list and full text of BITs is available at: http://www.untadxi.org/templates/DocSearch__779.aspx.

[5] Cremades, 'Arbitration in investment treaties: public offer of arbitration in investment protection treaties', in Briner, Fortier, Berger and Bredow (eds), *Liber amicorum böckstiegel*, 159 *et seq*.

[6] Paulsson, 'Arbitration without privity', 10 *ICSID Rev-FILJ* 232 (1995) 236 *et seq*.

[7] See Blessing, *Introduction to arbitration*, para 332; for an overview see Parra, 'Provisions on the settlement of investment disputes in modern investment laws, bilateral investment treaties and multilateral instruments', 12 *ICSID Rev-FILJ* 287 (1997) 322 *et seq*.

[8] See for example *Asian Agricultural Products Ltd* v *Republic of Sri Lanka*, 6 ICSID Rev-FILJ 526 (1991), 30 *ILM* 577 (1991); XVII YBCA 106 (1992); *Joseph Charles Lemire* v *Ukraine*, 15 ICSID Rev-FILJ 528 (2000); ICSID, *Compañía de Aguas del Aconquija, SA & Compagnie Générale des Eaux (now Vivendi)* v *Argentine Republic,* ARB/97/3, 21 November 2000, 40 *ILM* 426 (2001); *Lanco International Inc* v *The Argentine Republic*, ARB/97/6, 8 December 1998, 40 *ILM* 457 (2001).

3.4 The North-American Free Trade Agreement

The North American Free Trade Agreement (NAFTA) was entered into in 1993 by the United States, Canada and Mexico to provide for a widely-liberalised common market between the three countries. In addition to a general encouragement to settle disputes by arbitration or other means of alternative dispute resolution, NAFTA contains dispute settlement mechanisms in three different chapters. The most relevant of these is chapter 11 which deals with investments and has three parts:

- Part A sets out the substantive obligations of the contracting states.
- Part B provides a dispute settlement mechanism.
- Part C defines the significant terms used in the chapter.[9]

According to Part A the three contracting states guarantee:

- certain standards of treatment (i.e. national or most favoured nation treatment, whichever is better)
- freedom from performance requirements
- the right to control the investment through senior management of whatever nationality
- the right to repatriate profits without restrictions
- certain conditions of expropriation and information requirements.[10]

Any dispute arising out of an alleged violation of any of these duties in relation to an investment (as defined in Article 1139) is to be settled under the provisions of Part B.

According to the non-mandatory provisions of Article 1118 the disputing parties shall first try to settle any disputes amicably. If such an attempt fails the investor from a state party to NAFTA can proceed to arbitration on giving a 90 days' notice of an intention to submit a claim and provided that six months have elapsed since the events giving rise to the claim.[11] The investor has the choice to initiate arbitration:

- under the ICSID Convention
- under the ICSID 'Additional Facility' Rules
- or as an *ad hoc* arbitration under UNCITRAL Rules.[12]

According to Article 1121 the investor when doing so has to submit to arbitration under NAFTA:

- to ensure that any adverse award is also binding on him
- to waive the right to continue the same claim before other courts or tribunals.

[9] For a detailed analysis of chapter 11 see Eklund, 'A primer on the arbitration of NAFTA chapter eleven investor-state disputes', 11(4) *J Int Arb* 135 (1994); Horlick and Marti, 'NAFTA chapter 11B - A private right of action to enforce market access through investments', 14(1) *J Int Arb* 43 (1997); Alvarez, 'Arbitration under the North American Free Trade Agreement', 16 *Arb Int* 393 (2000). See also Trakman, 'Arbitrating investment disputes under the NAFTA', 18(4) *J Int Arb* 385 (2001) dealing with a hypothetical case under NAFTA on the 'expropriation' of a salmon farm by a tax raise intended to protect the environment.

[10] Ibid, 137–140.

[11] Articles 1119, 1120(1), which are intended to give the state the opportunity to reconsider the alleged violation, essentially a cooling off period. See Trakman, 'Arbitrating investment disputes under the NAFTA', 18(4) *J Int'l Arb* 385 (2001) 397; in the *ad hoc* arbitration, *Ethyl Corporation* v *The Government of Canada*, 38 ILM 708 (1999) the tribunal waived the six-month period.

[12] The ECT came into force on 16 April 1998 and there are now 51 signatories. <www.encharter.org>.

3.5 The Energy Charter Treaty

The Energy Charter Treaty was entered into in 1994 by 49 countries from Western, Central and Eastern Europe, Japan and Australia.[13]

Its objective is to provide a legal framework for a continuing co-operation between the contracting states in the energy sector and in particular to create a level playing field for investment in the eastern European energy sector.[14]

Part III sets out the provisions for the promotion, protection and treatment of investments in the energy sector. Part V contains the rather innovative regime for dispute settlement – creating a direct investor/state obligation of compulsory arbitration. According to Article 26(2) an investor from a Contracting State alleging a violation of treaty obligations has the right to bring a direct claim against the state:

- in the courts or administrative tribunals of the host state
- or in line with a pre-agreed dispute settlement procedure
- or in arbitration proceedings.

The investor is not bound by earlier contractual commitments when making its choice. It may opt for arbitration even though the contract with the state included a forum selection clause in favour of the host state's court or a different type of arbitration.[15] An investor opting for arbitration can choose between arbitration under:

- the ICSID rules
- the ICSID Additional Facility rules
- the SCC rules
- or *ad hoc* under UNCITRAL rules.

The Energy Charter Treaty does not contain a special enforcement regime. Therefore, with the exception of arbitration under ICSID rules, enforcement has to be based on the New York Convention. However, if a contracting state refuses to enforce or comply with an award such non-compliance amounts to a breach of the Treaty for which interstate arbitration under Article 27 is possible.

[13] See Wälde (ed), European Energy Charter Treaty: an East-West Gateway for investment & trade? (Graham and Trotman, 1996).

[14] Article 1120; in certain cases ICSID or ICSID Additional Facility arbitration may not be available since the dispute does not fall within the ambit of these rules. See Alvarez, 'Arbitration under the North American Free Trade Agreement', 16 *Arb Int* 393 (2000) 404.

[15] Paulsson, 'Arbitration without privity', 10 *ICSID Rev-FILJ* 232 (1995) 249; contra: Wälde, 'Investment arbitration under the Energy Charter Treaty – from dispute settlement to treaty implementation', 12 *Arb Int* 429 (1996) 445.

3.6 Arbitration proceedings under the ICSID Convention

ICSID was established by the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of the Other States.[16] 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.[17]

In 1978 ICSID created the 'Additional Facility' to cover cases which fall outside the ambit of the ICSID Convention, in particular where one of the parties is not from a contracting state.

[16] Text reproduced in 4 *ILM* 532 (1965), also available at www.worldbank.org/icsid.

[17] See generally Schreuer, *The ICSID Convention: a commentary* (CUP 2001).

To date over 130 states have ratified the ICSID Convention and over 150 disputes have been referred to ICSID arbitration.[18] 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.[19] As a consequence there has been a constant increase in the number of cases filed per year, currently about 25–30 cases annually.

[18] A list of the cases filed can be found at <http://www.worldbank.org/icsid/cases/cases.htm>.

[19] There are around 2200 different investment agreements which refer disputes to ICSID.

ICSID arbitration is an example of delocalised arbitration proceedings governed solely by international rules and not submitted to the provisions of any one national arbitration law. In particular, an ICSID award is not submitted to the scrutiny of national courts for annulment or enforcement. The only means of redress is:

- the delocalised internal ICSID annulment procedure
- and a facilitated procedure for the recognition and declaration of enforceability by ICSID.

3.6.1 The 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). 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
- 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.

The first requirement is fulfilled whenever there is a dispute about legal rights.[20] The other three requirements have been relied upon by states to challenge the jurisdiction of tribunals formed under the ICSID rules.

[20] ICSID, Decision of 11 July 1997 on Objections to Jurisdiction and award of 9 March 1998 in case no ARB/96/3, *Fedax NV* v *Republic of Venezuela*, XXIVa YBCA 23 (1999) 24, paras.1–2, 37 ILM 1378 (1998); ICSID, Decision of the Tribunal on objections to jurisdiction, 24 May 1999, *Ceskoslovenska Obchodni Banka, AS (Czech Republic)* v *The Slovak Republic*, XXIVa YBCA 44 (1999) 60, para.46; 14 ICSID Rev-FILJ 250 (1999).

Consent to arbitration

ICSID arbitrations require that all parties concerned have agreed to submit to an ICSID arbitration. The mere ratification of the ICSID Convention is not in itself consent to arbitration by a state. As the Preamble of the Convention clearly sets out, ratification does not oblige the state to submit a given dispute to arbitration. It serves only to make the state party to the ICSID Convention but does not grant jurisdiction to an ICSID tribunal.

The necessary consent may be contained in an arbitration agreement concluded between the state and the investor within the framework of the investment contracts or after the dispute has arisen.[21]

[21] For one of the rare cases where a state agreed under strong pressure from the investor's home state (delaying a loan of the Inter-American Development Bank) to ICSID arbitration after the dispute had arisen see the award of 17 February 2000, *Compania del Desarrollo de Santa Elena, SA* v *Republic of Costa Rica*, 15 ICSID Rev-FILJ 169 (2000).

It is, however, by no means necessary that the consent is contained in a single document or documents exchanged at the conclusion of the investment. Often the contract underlying the investment is not even concluded between the state and the investor but between the investor and a separate private entity incorporated in the state of investment.[22] The state in practice often declares its consent to ICSID arbitration in its investment legislation or in BITs. The standing offer by the state to arbitrate may be accepted at any time, including after the dispute has arisen. It is sufficient for an acceptance that an investor files a request for arbitration or invokes the provisions in a letter written to government officials.[23]

Once an arbitration agreement has been concluded no party can unilaterally revoke its effect. Although this follows from general contract law and is clearly provided for in Article 25(1), the issue arose in *Alcoa v Jamaica*.[24]

Requirements as to the parties involved

For the Convention to be applicable, one of the parties to the dispute must be a contracting state or a 'constituent subdivision or agency' which has been registered with the Centre. The registration, however, has primarily an evidentiary purpose in order to avoid doubts as to whether a state entity can be a party to ICSID arbitration. Therefore, the lack of formal registration does not prevent an entity becoming an eligible party if it has been made clear that it is a constituent subdivision or agency of a contracting state.

The other party must be a national of another contracting state.[25] This requirement must be fulfilled with regard to a natural person:

- at the time of the conclusion of the arbitration agreement
- at the time of the application for arbitration.

For a legal entity it is sufficient that it has the nationality of another contracting state only at the time that they entered into the arbitration agreement. It is also not necessary that the legal entity is a privately owned company. Partly or wholly state-owned companies also are covered. The nature of its activities is relevant – they must be private and commercial.[26]

Article 25(2)(b) states that a legal entity with the nationality of the host state may under certain circumstances be considered as a 'national of a different Contracting State'. This takes into account the fact that foreign investors are often required to channel their investment through locally-incorporated companies. The parties may agree that in these circumstances the local legal entity may be given the status of a 'national of a different Contracting State' so that ICSID procedures are available. In *Amco v Indonesia* the tribunal held that it was not necessary to expressly give this status to the local company. It was sufficient for the state party to know that the local company was owned by an investor from a different contracting state.[27]

Often the local company is not controlled directly by the foreign investor but is at the end of a pyramid of control. Questions as to the nationality of the controlling party may arise if certain parts of the pyramid are not nationals of contracting states. In *Amco* v *Indonesia* the tribunal considered the direct parent company to be the relevant party which had to have the nationality of another contracting state.

[22] In *SPP* v *Egypt* for example, the investment contract was concluded between SPP and the Egyptian General Organisation for Tourism and Hotels, a public entity with separate legal personality under the Ministry of Tourism.

[23] ICSID, Decision on jurisdiction, 27 November 1985, *South Pacific Properties (Middle East) Ltd and South Pacific Properties Ltd (Hong Kong)* v *The Arab Republic of Egypt*, XVI YBCA 19 (1991), and ICSID, Decision of 14 April 1988, XVI YBCA 28 (1991); *Asian Agricultural Products Ltd (AAPL)* v *Republic of Sri Lanka,* 30 ILM 580 (1991); XVII YBCA 106 (1992); *Tradex Hellas SA* v *Republic of Albania,* Decision on Jurisdiction, 24 December 1996, 14 ICSID Rev-FILJ 161 (1999) 187; *Ceskoslovenska Obchodni Banka, AS (Czech Republic)* v *The Slovak Republic,* Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999, XXIVa YBCA 44 (1999) 54.

[24] *Alcoa Minerals of Jamaica* v *Government of Jamaica*, IV YBCA 206 (1979) 207 et seq.

[25] See ICSID Convention Article 25(2).

[26] See ICSID, 24 May 1999, *Ceskoslovenska Obchodni Banka, AS (Czech Republic)* v *The Slovak Republic,* decision on jurisdiction, XXIVa YBCA 44 (1999) 48; 14 ICSID Rev-FILJ 250 (1999).

[27] ICSID, *Amco Asia Corp and others* v *Republic of Indonesia*, Decision on Jurisdiction, 23 ILM 351 (1984) 359 *et seq*. See also ICSID, Decision on jurisdiction, *Société Ouest Africaine des Bétons Industriels* v *Republic of Senegal*, 6 ICSID Rev-FILJ 217 (1991) 225, paras.35 *et seq.*; *Vacuum Salt Production Limited* v *Government of the Republic of Ghana*, 4 ICSID Rep 320 (1997) 346 para.43.

Investment

An 'investment' within the scope of Article 25 is not defined in the ICSID Convention. The draftsmen wanted to leave it primarily to the parties to decide what constituted an investment.[28] An arbitration clause providing for ICSID arbitration is an implied agreement that their 'investment' falls under Article 25. The same applies to the unilateral offers to arbitrate contained in the various investment protection laws and investment treaties. They extend the ICSID arbitration option to all types of investment covered by the relevant legal instrument.

[28] Shihata, 'Towards a greater depoliticisation of investment disputes: the role of ICSID and MIGA', 1 *ICSID Rev-FILJ* 1(1986) 5.

As a consequence the wide definitions of investment contained, for example, in NAFTA or the Energy Charter Treaty are indirectly also relevant for the determination of what constitutes an investment for the purposes of Article 25.

It appears from the case-law and legal scholarship that investment has the following typical characteristics:

- the project should have a certain duration
- there should be a certain regularity of profit and return
- there is typically an element of risk for both sides
- the commitment involved would have to be substantial
- the operation should be significant for the host state's development.

3.6.2 Specifics of ICSID arbitration proceedings

ICSID arbitration proceedings are in many respects similar to other types of institutional arbitration. They are governed by the ICSID Convention and the ICSID Arbitration Rules in force at the time of the parties' consent to arbitration.[29] No national law is applicable to the proceedings which has led many legal authorities to consider ICSID arbitration as an object of delocalised arbitration. If the procedural rules found in the Convention and the arbitration rules do not provide for a certain problem the tribunal has a residual power to decide that issue in a manner which it deems appropriate.

[29] ICSID Convention Article 44.

Composition of the arbitration tribunal

The parties are free to agree the number of arbitrators. In the absence of an agreement a three-member tribunal will decide the case. One arbitrator appointed by each party and the two party-appointed arbitrators together agree on the chairman.[30] The parties are not bound to appoint people from the panel of arbitrators maintained by ICSID but they must comply with Article 39. According to Article 39 the majority of arbitrators must have a different nationality from those of the parties. The effect of this provision is that only if the parties appoint all members of the tribunal together can they appoint arbitrators of their nationality. In this respect the ICSID Convention differs from the rules of other institutions which only require that the chairman or sole arbitrator is a neutral national.

[30] Washington Convention Article 37(2)(b); ICSID rules, rule 2.

If the arbitrators have not been appointed within 90 days after sending the notification (or within any period agreed by the parties) their appointment can be made by ICSID from members of its panel who should not be the same nationality as any of the parties. Article 14 requires:

- that the arbitrators should be people of high moral standards and qualifications
- that they can be relied upon to render an independent judgment.

The parties may challenge any arbitrator who does not fulfil these requirements.

Proceedings before the arbitration tribunal

Proceedings are initiated by the request for arbitration which must contain information concerning:

- the issues in dispute
- the identity of the parties
- the parties' consent to arbitration.

The request has to be lodged with the Secretary General. To avoid any misuse of ICSID, the Secretary General may refuse to register the request if, on the basis of the information provided, the dispute is manifestly outside the jurisdiction of the Centre.[31]

[31] *Ibid*, Article 36(3).

The ICSID rules provide for two distinct phases of the proceedings: written proceedings followed by oral proceedings. After the constitution of the tribunal, the chairman or sole arbitrator should hold a pre-hearing conference to agree the form of the proceedings. Objections to the jurisdiction of the tribunal must be raised as early as possible and no later than the time fixed for the counter-memorial or the rejoinder if they relate to a counterclaim. As the tribunal may ascertain its jurisdiction at any stage of the proceedings on its own motion, the consequences of a late filing are not serious. Objections to jurisdiction will in general be dealt with in an interim procedure while the proceedings on the merits are stayed.

Powers of the arbitration tribunal

The arbitration tribunal can decide on its own jurisdiction. The registration of a request for arbitration by the Secretary General does not influence the decision of the tribunal. The tribunal at its discretion can either decide on its jurisdiction as a preliminary question or join it to the decision on the merits.

It is a question of procedural economy. A preliminary decision finding jurisdiction, however, does not of itself constitute an award for the purposes of Rule 50 or 52 ICSID rules which could be the object of a separate action for annulment.

The tribunal can engage in default proceedings if one party does not take part in the arbitration. Default is not considered to be an admission of the other party's claim. By contrast rule 42(4) ICSID rules requires the tribunal to examine its jurisdiction and (provided that it has jurisdiction) decide whether the submissions are well founded in both law and fact. It may require the party not in default to present evidence as to any issues relevant for the decision.

Provisional measures

In ICSID arbitrations interim relief can only be granted by the tribunal. Without an agreement to the contrary no party can apply to a state court for interim measures of protection. The power of a tribunal to grant interim relief is limited. According to Article 47 it

cannot order measures but merely recommend them. The third peculiar feature of interim relief within the ICSID framework is the power of the tribunal to recommend measures on its own initiative.

Applicable law

The law applicable to the substance of the case can be chosen by the parties. Such choice does not have to be express or even in a specific form if the tribunal finds clear evidence of the parties' agreement on law. Since Article 42(1) refers to the 'rules of law as may be agreed by the parties' the parties may also choose a non-national law, such as *lex mercatoria* or international law. Article 42(3) provides that the parties can also empower the tribunal to decide *ex aequo et bono*.

In the absence of an express choice of law by the parties, the tribunal has to apply the law of the state party, including the relevant conflict of laws rules, and 'such rules of international law as may be applicable'. This reflects the general presumption that a state will not submit to foreign national law. By corollary it is presumed the private party will be concerned about unilateral and unfavourable changes of the law by the state party, if the law of the state party is applicable. To accommodate these concerns it is usually the law of the state party which applies, with the results of such application to be tested against the rules of international law. If international law is violated by the application of the host state's national law, the national law will not be applied.

ICSID award

Awards can be rendered by the majority of the tribunal. Every arbitrator has the right to have an individual opinion (agreeing or dissenting) attached to the award. Article 48(3) requires that the award has to address every issue presented to the tribunal with reasons given. Several *ad hoc* committees considered the ambit of this requirement. Non-fulfilment of this constitutes a reason for annulment in accordance with Article 52(1)(e). The binding nature of the arbitration award (which prevents a party from re-litigating the same issue in a different court) is inherent in the concept of arbitration. In this respect Article 53(1) has primarily a declaratory and clarifying function. The obligation to comply with the award is, as far as the state is concerned, an international treaty obligation. For the non-state party it is an obligation arising under the arbitration agreement.

3.6.3 Remedies against awards

The most distinctive feature of ICSID arbitration is the self-contained and exhaustive nature of its review procedures. Unlike other arbitration regimes control is exercised by internal procedures rather than by the courts. Remedies against the award are limited to those provided for in the Convention and do not include court involvement. The Convention provides for:

- rectification of minor clerical errors (Article 49(2))
- interpretation (Article 50)
- revision (Article 51)
- annulment (Article 52) of the award.

Rectification, interpretation and revision

Rectification, interpretation and revision are not remedies in a true sense as they do not require the referral of a dispute to a different decision-making body. The ICSID Convention provides that rectification can only be granted from the original tribunal. The two other requests (i.e. interpretation and revision) should preferably be handled by the original tribunal which is in the best position to grant those remedies. If that tribunal is for any reason no longer available, then requests for interpretation and revision can be referred to a new tribunal constituted in accordance with the procedure adopted for the original tribunal. In both cases enforcement of the award can be stayed while a decision is pending, the application for revision leading to an automatic preliminary stay.

Annulment proceedings

The annulment proceedings under Article 52 are a distinct feature of ICSID arbitrations. Under all other arbitration regimes the review of an award in challenge proceedings is effected by state courts, usually those of the place of arbitration. Article 52 provides for internal control through an *ad hoc* committee. This internal ICSID control of the award is intended to avoid protracted and long-lasting proceedings in state courts. Furthermore, it takes account of the special factual situation in state contracts. The state party would not want to submit to the jurisdiction of a different state and the private party may not trust the courts of the host state.

Irrespective of whether the criticism is justified and of the control actually exercised, all *ad hoc* committees have emphasised the fact that the annulment proceedings are not supposed to be an appeal. They are limited to controlling the legitimacy of the decision-making process. The right to have the award controlled in annulment proceedings cannot completely be waived in advance. Not all grounds which justify an annulment primarily protect the interest of the parties. Some of them (e.g. the impartiality of the arbitrator) also serve to protect the integrity of the arbitration process as such and are therefore not at the disposition of the parties. The parties are still obliged to raise the grounds of challenge as early as possible. A party which knowingly fails to challenge a serious procedural irregularity before the tribunal may be barred by Rule 27 from seeking annulment on that basis.[32]

The grounds for an annulment are listed exhaustively in ICSID Convention Article 52(1):

> 'Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:
>
> (a) that the Tribunal was not properly constituted;
>
> (b) that the Tribunal has manifestly exceeded its powers;
>
> (c) that there was corruption on the part of a member of the Tribunal;
>
> (d) that there has been a serious departure from a fundamental rule of procedure; or
>
> (e) that the award has failed to state the reasons on which it is based.'

[32] For an analysis of the entire waiver mechanism see Schreuer, 'Commentary on the ICSID Convention', 13 *ICSID Rev-FILJ 478* (1998) 534 paras.51 *et seq.*

Most of the grounds mentioned are also found in the provisions for control of awards contained in other arbitration regimes. The grounds mentioned in Article 52 are, however, narrower in that not every excess of power or departure from a rule of procedure is sufficient to annul an award.

By contrast the ICSID Convention requires a qualified form or a manifest excess of powers. Furthermore, violation of public policy is not mentioned as a separate ground for annulment. Proper constitution of the tribunal and corruption of an arbitrator have been of no practical importance to date. The ICSID secretariat manages the appointment process carefully and the arbitrators appointed are usually of such quality that these grounds do not arise.

3.6.4 Recognition and enforcement

ICSID awards are subject to a special regime for recognition and enforcement contained in Article 54 of the Convention. All contracting states are required to recognise the award and enforce its pecuniary obligations as if it were a final judgment of the court of the state. This obligation exists independently from whether or not the state in question or its nationals were a party to the proceedings. While the obligation to recognise awards is not limited to any form of award the facilitated enforcement procedure only covers the pecuniary obligations. Orders for specific performance or other non-pecuniary obligations must be enforced under the New York Convention or the law of the state of enforcement.

In practice most awards are performed voluntarily as generally a cost/benefit analysis is in favour of compliance. The damage to the international reputation of the state following non-compliance and the effect that can have on further investment is in most cases greater than the amounts to be paid under the award. In the past the Secretary General of ICSID has officially communicated with recalcitrant parties and reminded them of their obligation.

3.7 Arbitration under ICSID 'Additional Facility' rules

The 'Additional Facility' and its arbitration rules were created in 1978 to provide for dispute settlement facilities under the auspices of the World Bank for disputes between a state and a foreign party which are not covered by the ICSID Convention. According to Article 2(a) Additional Facility Rules jurisdiction requires that either the state or the private party's state of origin is a contracting state to the ICSID Convention. It is not required that the dispute arises out of an investment in the sense of the ICSID Convention but it must involve a transaction which by the intention of the parties, its duration or importance goes beyond an ordinary commercial contract. The practical importance of the Additional Facility has increased considerably with:

- NAFTA
- the Energy Charter Treaty
- a number of BITs referring to its dispute settlement proceedings.

Arbitration under the 'Additional Facility' rules is more akin to other institutional arbitrations than ICSID Convention arbitration. Accordingly, awards made under the 'Additional Facility' rules may be subject to challenge in the courts of the place of arbitration as the self-contained and exhaustive review system of the ICSID Convention is not applicable. Awards rendered under the Additional Facility Rules do not benefit from the facilitated recognition and enforcement under the ICSID Convention. They have to be enforced under the New York Convention.

3.7.1 Resources of investment arbitration

Investment arbitration is dynamic and most resources are available electronically. Here is a brief selection:

ICSID

- www.worldbank.org/icsid
- http://www.unctad.org/en/docs/edmmisc232add1_en.pdf
- http://www.unctad.org/en/docs/edmmisc232add2_en.pdf
- http://www.unctad.org/en/docs/edmmisc232add3_en.pdf
- http://www.unctad.org/en/docs/edmmisc232add4_en.pdf
- http://ita.law.uvic.ca/alphabetical_list.htm
- http://www.ppl.nl/bibliographies/all/?bibliography=investment
- currently, there is a reform discussion at ICSID.

NAFTA

- http://www.nafta-sec-alena.org/english/index.htm
- http://www.sice.oas.org/trade/nafta.asp
- www.naftaclaims.com.

Energy Charter Treaty

- www.encharter.org.

BITs

- www.worldbank.org/icsid/treaties/treaties.htm.
- http://unctadxi.org/templates/DocSearch____779.aspx
- www.unctad.org/en/docs/poiteiiad2.en.pdf
- http://untreaty.un.org
- http://ita.law.uvic.ca.

Useful further reading

- *** Visit the web site of UNCTAD – www.unctad.org which contains a course on dispute settlement with a number of relevant chapter.

Self-assessment questions

1 Describe the essential differences between the International Centre for the Settlement of Investment Disputes and (i) the Court of Arbitration of the International chamber of Commerce, (ii) the London Court of International Arbitration (iii) the American Arbitration Association and (iv) CIETAC with specific reference to:

- the raison d'être of ICSID
- the background to the establishment of ICSID
- the basis of jurisdiction of ICSID
- the enforcement of ICSID Awards.

2 In what circumstances is ICSID an appropriate arbitration tribunal to hear disputes, and what is the basis upon which it will accept jurisdiction?

3 Describe the mechanism for appointing arbitrators under the ICSID Arbitration Rules, as well as the circumstances for the retirement and/or removal of arbitrators, and their replacement.

4 In what circumstances can there be an appeal against an award rendered by arbitrators under the ICSID Arbitration Rules? Give examples, including facts, of cases where ICSID awards have been subject to appeal.

5 'As a result of the publication of certain ICSID awards and of the disclosure by the Secretariat of the non-confidential information about ICSID proceedings, it can be expected that the international community will become more than ever aware of the merits of the ICSID machinery and show increasing willingness to make use of its facilities. '(George Delaume, in 'ICSID Arbitration', in *Contemporary problems in international arbitration,* Julian D.M. Lew, ed., 23, at 38).

Has this view been vindicated by later developments?

Reminder of learning outcomes

By this stage you should be able to:

- ☐ be familiar with the peculiarities of investment arbitration
- ☐ have an introduction to ICSID arbitration
- ☐ have an introduction to BIT arbitration
- ☐ be aware of other investment treaty arbitration systems.