INTERNATIONAL DISPUTE
SETTLEMENT 2003-2004

MIXED INTERNATIONAL ARBITRATION:
ICSID & INTERNATIONAL INVESTMENT
ARBITRATION

ICSID

General reading:

* ICSID Review-Foreign Investment Law Journal
**ICSID awards and materials are now being collected and republished in the ICSID
Reports (CUP, 1993-) and at http://www.worldbank.org/icsid/cases/awards.htm;

* Toope, Mixed International Arbitration (1990), ch. VII
-Hirsch, The Arbitration Mechanism of the International Centre for the Settlement of
Investment Disputes, (1993)

BACKGROUND:

1. ICSID was established by the World Bank in an attempt to remove one of the
main legal / political obstacles to the flow of foreign investment to developing States.
See Sutherland, 28 ICLQ 367 (1979) -and references therein; Akinsanya,
"International Protection of Direct Foreign Investment in the Third World", 36 ICLQ
58 (1987); Asante, "International Law and Foreign Investment: A Reappraisal", 37
ICLQ 588 (1988); I. Cheyne, "Investment Promotion and Protection Agreements", 36

2. For early attempts to address this problem see: 1948 Havana Charter -see
Schwarzenberger, in C. Sanders (ed.) International Arbitration: Liber Amicorum for
1962, 1967 OECD Draft Conventions on the Protection of Foreign Property -see
3. For examples of ad hoc arbitrations concerning foreign investment see: e.g., *Abu Dhabi*, (1951) ILR 144; *Aramco* (1958) 27 ILR 117; *Sapphire International*, (1963) 35 ILR 136.


**THE ICSID FRAMEWORK:**

6. Three main components: Arts. 4-8 Administrative Council; Arts. 9-11 Secretariat; Arts. 12-16 Panels of Conciliators and Arbitrators.

**PROCEDURE**

7. The basic principle: ICSID 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 dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally."

8. "Investment" very widely defined: but see Mihaly International Cop. v. Sri Lanka (ICSID Case ARB/00/2; [http://www.worldbank.org/icsid/cases/awards.htm](http://www.worldbank.org/icsid/cases/awards.htm); 17 ICSID Review 140 (2002).


10. **ICSID jurisdiction** is based on consent, which must be given in two stages. Stage (i) is ratification [about 149 States parties; more on the way]. For possible

11. Stage (ii) is the specific consent to jurisdiction over the particular dispute / compromis. This many take a variety of forms. Consent is irrevocable: Jamaican Bauxite cases (Alcoa Minerals of Jamaica Inc./ Reynolds Jamaica Mines Ltd / Kaiser Bauxite Company v. Jamaica), 5 Y’bk Comm. Arb. 206; 1 ICSID Reports 206.


(1985) (Belgium); 26 ILM 382 (1986) (Switzerland). Cf., Delaume, "ICSID
Arbitration and the Courts", 77 AJIL 785; Friedland, "Provisional Measures in
however, some doubt as to whether the jurisdiction of courts to order conservatory
measures is ousted: see Atlantic Triton v. Guinea, Cour de cassation France, 1986, 26
ILM 373 (1986), 3 ICSID Reports 3-13 (provisional measures possible unless
expressly excluded by the parties, or impliedly excluded by the adoption of arbitral
rules calling for such exclusion). See Schreuer, pp. 369-387.

18. Art. 27 recourse to ICSID precludes int'l claims.

19. Note that under some BITs, recourse to local remedies precludes recourse to
ICSID—the ‘fork in the road’.

20. For ICSID Conciliation Commissions see Arts. 28-35.

21. ICSID arbitration: Arts. 36-47. *Article 42 applicable law; no non liquet; see W.
M. Reisman, ‘The Regime for Lacunae in the ICSID Choice of Law Provision and the
Question of Its Threshold’, 15 ICSID Review 362-381 (2000); Ex aequo et bono if
parties agree. Article 45 non-appearance, not an admission; but tribunal may render
award. Article 53 awards binding.

22. Remedies available to the tribunal appear to be confined to awards of damages.
Tribunals may not, for example, order the liquidation of enterprises: Adriano
Gardella v. Ivory Coast (1997), 1 ICSID Reports 283 at 294.

23. ICSID awards are not subject to appeal or other remedy, but see art. 50
interpretation of award; art. 51 revision of award -new facts; art. 52 annulment of
award: Tribunal not properly constituted; manifestly exceeded powers; corruption;
serious procedural defect; failure to state reasons.

24. For examples of reviews of ICSID awards see, e.g.,

(provisional measures, 1983), (1985) 24 ILM 365, 89 ILR 402
(award, 1984), (1985) 24 ILM 1022, 89 ILR 405
(annulment, 1986), (1986) 25 ILM 1439, 89 ILR 514

AMCO Resubmission
(jurisdiction II, 1988), (1988) 27 ILM 1281, 89 ILR 552
(award II, 1990), (1991) 118 J. Droit Int. 172, 89 ILR 580
(and reprinted in ICSID Reports vol.1)

Klöckner/Cameroon,
(award, 1983), (1984) 111 J. Droit Int. 401; 2 ICSID Reports 3
(annulment, 1985), 1 ICSID Review 89 (1986); 2 ICSID Reports 95
(annulment II -application rejected 1989), 5 ICSID Review 95 (1990)


Recent cases in ICSID


INTERNATIONAL INVESTMENT ARBITRATION

27. Note role of investment arbitrations outside ICSID framework. See, for instance, the bilateral treaties in the Americas: http://www.sice.oas.org/bitse.asp. These typically set out the substantive obligations towards investors, a process for the settlement of State-investor disputes, sometimes offering the choice of some or all of ICSID, ad hoc arbitration under UNCITRAL or some other set of arbitration rules, and recourse to national courts. There may be a duty to exhaust local remedies.


29. The NAFTA Chapter Eleven provisions: http://www-tech.mit.edu/Bulletins/nafta.html http://www.naftaclaims.com/; and see http://www.naftaclaims.com/, are important. See also the provisions in MERCOSUR, http://www.sice.oas.org/agreemts/Mercin_e.asp#MERCOSUR.

Remember: Google http://www.google.com is an invaluable resource for tracking down information.