

# INTERNATIONAL DISPUTE SETTLEMENT 2003-2004

## MIXED INTERNATIONAL ARBITRATION: ICSID & INTERNATIONAL INVESTMENT ARBITRATION

### ICSID

#### General reading:

**\*\* Web site:** see <http://www.worldbank.org/icsid/index.html>

**\* *ICSID Review-Foreign Investment Law Journal***

**\* *News from ICSID*,** <http://www.worldbank.org/icsid/news/news.htm>

**\*\*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>;**

**\*Schreuer, *The ICSID Convention: A Commentary*, (2001)**

**\* 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 ICLQ 929 (1987).

2. For early attempts to address this problem see: 1948 Havana Charter -see Schwarzenberger, in C. Sanders (ed.) *International Arbitration: Liber Amicorum for Martin Domke*, (1967), p. 313. 1959 Abs-Shawcross Draft Convention on Investments Abroad -see Schwarzenberger, 14 *Current Legal Problems* 213 (1961). 1962, 1967 OECD Draft Conventions on the Protection of Foreign Property -see Schwarzenberger, *Foreign Investments and Int'l Law*, (1969), p. 153.

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.
4. The ICSID framework was established in the **\*\*1965 Washington Convention: Convention on the Settlement of Investment Disputes between States and Nationals of Other States**, 1965: 575 UNTS 159; 4 ILM 524 (1966); 60 AJIL 892 (1966). As of 16 September 2002, 153 States signed, 136 ratified. (Prominent non-signatories include Canada, India, Iraq, Mexico; Russia has signed but not ratified). Cf., ICSID Rules of Procedure for Conciliation Proceedings, and ICSID Rules of Procedure for Arbitration Proceedings. ICSID basic documents are published at: <http://www.worldbank.org/icsid/basicdoc/basicdoc.htm>. And note the ICSID Additional Facility, 21 ILM 1443 (1982).
5. ICSID clauses now commonly appear in investment treaties and laws. See Denza and Brooks, "Investment Protection Treaties: United Kingdom Experience", 36 ICLQ 908 (1987); R. Dolzer and M. Stevens, *Bilateral Investment Treaties* (1995), chapter five.

## 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>); 17 ICSID Review 140 (2002).
9. The **1978 Additional Facility** extended ICSID's jurisdiction to disputes where only one party is an ICSID Contracting State or national thereof. *Robert Azinian and others v. United Mexican States; Metalclad Corporation v. United Mexican States*: <http://www.worldbank.org/icsid/cases/awards.htm>.
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

"reservations": Art. 25(4) –see *Jamaican Bauxite cases (Alcoa Minerals of Jamaica Inc./ Reynolds Jamaica Mines Ltd / Kaiser Bauxite Company v. Jamaica)*, 5 Ybk Comm. Arb. 206; 1 ICSID Reports 206.

11. Stage (ii) is the specific consent to jurisdiction over the particular dispute / compromis. This may 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 Ybk Comm. Arb. 206; 1 ICSID Reports 206.

12. Consent in bilateral treaties: ICSID, *Bilateral Investment Treaties 1959-1996* (1997); R. Dolzer and M. Stevens, *Bilateral Investment Treaties* (1995), chapter five. For list of (c. 1800) treaties giving ICSID jurisdiction, see ICSID *Investment Treaties*, and <http://www.worldbank.org/icsid/treaties/treaties.htm>. *Asian Agricultural Products v Sri Lanka* (1990), 30 ILM 577, 4 ICSID Reports 245; UK/Sri Lanka Agreement for Promotion and Protection of Investments 1980, 19 ILM 886 (1980). *American Manufacturing & Trading Inc. v. Republic of Zaire* (1997), 36 ILM 1531 (1997); US/Zaire Treaty concerning the Reciprocal Encouragement and Protection of Investments, 1984 (see S. Zamora and R. A. Brand, *Basic Documents of International Economic Law*, vol. 1 (1990), 649-664. Note effect of MFN clauses: *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID case No. ARB/97/7, decision on jurisdiction dated January 21, 2000, ICSID Review Foreign Investment Law Journal, Vol. 16, No. 1, 2001.

13. Consent in multilateral treaties. See, e.g., art 26(4), Energy Charter Treaty, <http://www.encharter.org/upload/1/TreatyBook-en.pdf>; art. 1120, NAFTA, <http://www-tech.mit.edu/Bulletins/nafta.html>; North American Free Trade Agreement (Canada-Mexico-USA, 1992), 32 ILM 605 at 644 [art. 1122] (1993) [*Metalclad Corporation v. United Mexican States*; *Azinian v. United Mexican States*], G. Turner, 'Investment Protection through Arbitration', [1998] *Int. Arb. L. R.* 166.; and the MERCOSUR Colonia Protocol: [http://www.sice.oas.org/agreements/Mercin\\_e.asp#MERCOSUR](http://www.sice.oas.org/agreements/Mercin_e.asp#MERCOSUR).

14. Consent in municipal legislation of about 20 States; A. Parra, 'Principles governing foreign investments, as reflected in national investment codes', 7 ICSID Review-FILJ 428 (1992). *AMCO Asia v. Indonesia*, 23 ILM 351 (1984), 89 ILR 368. *Southern Pacific Properties v. Egypt*, 32 ILM 933 (1993).

15. Procedure: request for conciliation/arbitration; screened by Sec-Gen: see A. Escobar, 'Three Aspects of ICSID's Administration of Arbitration Proceedings', *News from ICSID*, Vol. 14, No. 2 (Summer 1997), 4-8.

16. The President of the Administrative Council (the President of the World Bank, *ex officio*) empowered to appoint any arbitrators not appointed by the parties: art. 38, and see *Kaiser Bauxite Company v. The Government of Jamaica* (1975), 1 ICSID Reports 296; *AGIP SPA v. The Government of the People's Republic of the Congo* (1979), 1 ICSID Reports 306. A. Parra, 'The rights and duties of ICSID arbitrators', *News from ICSID*, Vol. 13, No. 1, pp. 4-11 (1996).

17. Art. 26: recourse to ICSID ousts jurisdiction of other fora. *MINE v. Guinea* [in ICSID Reports vol. 4]; *News from ICSID*, Summer 1986, p. 4; and 24 ILM 1639

(1985) (Belgium); 26 ILM 382 (1986) (Switzerland). Cf., Delaume, "ICSID Arbitration and the Courts", 77 AJIL 785; Friedland, "Provisional Measures in ICSID", (1986) *Arb. Int.* 335. *AMCO Asia v. Indonesia*, 24 ILM 365 (1985). There is, 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.,

*AMCO*, (jurisdiction, 1983), (1984) 23 ILM 351, 89 ILR 379  
(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  
Second annulment: application rejected in part, 17 December 1992.  
(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  
(award II, 1988), 14 *Ybk Commercial Arb.* 82 (1989)  
(annulment II -application rejected 1989), 5 *ICSID Review* 95 (1990)

25. ICSID was accused, in the context of those cases, of having an inappropriate 'hair-trigger' review procedure. See M. Reisman, 'The breakdown of the control mechanism in ICSID arbitration', 4 *Duke Law Journal* 739 (1989). The defect appears to have been 'corrected': see the annulment award, paras. 4.08-4.10, in *MINE v. Republic of Guinea* (1989), 5 *ICSID Review-FILJ* 95 (1990), 4 *ICSID Reports* 79. See A. Broches, 'Observations on the Finality of ICSID Awards', 6 *ICSID Review-FILJ* (1987) and in A. Broches, *Selected Essays* (1995), ch. 14.

26. Enforcement of ICSID awards: art. 54, Contracting States to recognise and enforce award; see Delaume, 'Recognition and enforcement of State contract awards in the United States: a restatement', 91 *AJIL* 476 (1997). Art. 55, saving for Contracting State law on State immunity from execution; art. 53 duty to comply: non-compliance a breach of Convention.

### ***Recent cases in ICSID***

See < <http://www.worldbank.org/icsid/cases/pending.htm> > and < <http://www.worldbank.org/icsid/cases/conclude.htm> >

## **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.

28. There are multilateral provisions, too, such as those in the Energy Charter Treaty (Parts III and V): <http://www.encharter.org/upload/1/TreatyBook-en.pdf>. Cf., [http://www.freshfields.com/practice/energy/publications/e\\_charter/en.asp](http://www.freshfields.com/practice/energy/publications/e_charter/en.asp)

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](http://www.sice.oas.org/agreemts/Mercin_e.asp#MERCOSUR).

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