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Introduction

Foreign investment is increasingly an integral part of the world economy. In developing countries,

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.

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.

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 provid

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:

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.

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.