Investment Arbitration
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Investment Disputes – ISDS

• Foreign investor vs. host State
• Violation of treatment standards based on customary int’l law or treaties ~ treaty claims
• Breaches of contractual obligations ~ contract claims
Treaty claims

- Fair and equitable treatment
- Full protection and security
- MFN and national treatment
- Prohibition of arbitrary and discriminatory measures
- Expropriation

Contract Claims

- Concessions or other contracts between investors and host states
- Breach of contract,
- Non- or malperformance
- Warranty
- Non-payment
Possible Dispute Settlement Mechanisms

- National courts
- Conciliation
- Arbitration
- Inter-state arbitration or litigation
- Diplomatic protection

Investment Arbitration Boom

- Since the mid-1990s dramatic increase in ICSID, ICSID Additional Facility as well as UNCITRAL and other investment arbitration (LCIA, SCC, PCA, ICC, etc.)
- Driving force: so-called treaty arbitration based on more than 2500 bilateral investment treaties (BITs), NAFTA Chapter 11 as well as other investment chapters of Free Trade Agreements and multilateral treaties such as the Energy Charter Treaty.
Investment Arbitration Changes

‘The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union’s external action.’

Article 207(1) The Treaty on the Functioning of the European Union

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Investment Arbitration Changes

• **Investment chapters in EU FTAs:**
  • Comprehensive Trade and Economic Agreement (CETA) with Canada.
  • Transatlantic Trade and Investment Partnership (TTIP)

• **EU Member State BITs:**
Basis for Arbitration - Consent

- Arbitration clause in investor/State contract
- Treaty-based arbitration
  - Separate acts/instruments containing offer and acceptance to form consent
- Other unilateral offers

Contractual consent

- “The [Government]/[name of constituent subdivision or agency] of name of Contracting State (hereinafter the "Host State") and name of investor (hereinafter the “Investor”) hereby consent to submit to the International Centre for Settlement of Investment Disputes (hereinafter the “Centre”) any dispute arising out of or relating to this agreement for settlement by [conciliation]/[arbitration]/[conciliation followed, if the dispute remains unresolved within time limit of the communication of the report of the Conciliation Commission to the parties, by arbitration] pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter the “Convention”).”
- 1993 ICSID Model Clauses
Alternative forms of consent

- Through legislation
- Through BITs
- Through multilateral IIAs

Legislation

- Article 8 Egyptian Law No. 43 of 1974 Concerning the Investment of Arab and Foreign Funds and the Free Zone:
- “Investment disputes in respect of the implementation of the provisions of this Law shall be settled in a manner to be agreed upon with the investor, or within the framework of the agreements in force between the Arab Republic of Egypt and the investor’s home country, or within the framework of the Convention for the Settlement of Investment Disputes between the State and the nationals of other countries to which Egypt has adhered by virtue of Law No. 90 of 1971, where such Convention applies.”
Legislation

- “116. On the basis of the foregoing considerations, the Tribunal finds that Article 8 of Law No. 43 establishes a mandatory and hierarchic sequence of dispute settlement procedures, and constitutes an express “consent in writing” to the Centre’s jurisdiction within the meaning of Article 25(1) of the Washington Convention in those cases where there is no other agreed upon method of dispute settlement and no applicable bilateral treaty.”

BIT clause

- ARTICLE 9 Austrian Model BIT 2008:
  - Settlement of Investment Disputes
  - “(1) Any dispute arising out of an investment, between a Contracting Party and an investor of the other Contracting Party shall, as far as possible, be settled amicably between the parties to the dispute.
  - (2) If a dispute according to paragraph (1) cannot be settled within three months of a written notification of sufficiently detailed claims, the dispute shall upon the request of the Contracting Party or of the investor of the other Contracting Party be subject to the following procedures:
    - a) ICSID conciliation or arbitration; or
    - b) UNCITRAL arbitration [...]"
IIA clause

- “1. Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement.
- 2. The consent given by paragraph 1 and the submission by a disputing investor of a claim to arbitration shall satisfy the requirement of:
  - (a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the Additional Facility Rules for written consent of the parties;
  - (b) Article II of the New York Convention for an agreement in writing; and
  - (c) Article I of the Inter American Convention for an agreement.”
- NAFTA Article 1122: Consent to Arbitration

Narrow dispute settlement clauses

- “1. Any dispute between one Contracting Party and an investor of the other Contracting Party concerning the amount or mode of compensation to be paid under Article 5 of the present Treaty shall be the subject of a written notice, accompanied by a detailed memorandum, to be submitted by the investor to the Contracting Party involved in the dispute. Whenever possible, the parties to this dispute shall endeavour to settle amicably and to their mutual satisfaction.
- 2. If such a dispute has not been settled in this way within a period of six months from the date of the written notification mentioned in paragraph 1 of this Article, it shall be submitted at the investor’s choice to; [Stockholm Chamber of Commerce or UNCITRAL arbitration].”
- Article 10 Belgium-Luxembourg/USSR BIT 1989
**Berschader v Russia 2006**

- “From the ordinary meaning of Article 10.1, it can only be assumed that the Contracting Parties intended that a dispute concerning whether or not an act of expropriation actually occurred was to be submitted to dispute resolution procedures provided for under the applicable contract or alternatively to the domestic courts of the Contracting Party in which the investment is made.”

**Narrow dispute settlement clauses**

- “Any dispute between an investor of one Contracting Party and the other Contracting Party in connection with an investment in the territory of the other Contracting Party shall, as far as possible, be settled amicably through negotiations between the parties to the dispute.
- […]
- If a dispute involving the amount of compensation for expropriation cannot be settled within six months after resort to negotiations as specified in Paragraph 1 of this Article, it may be submitted at the request of either party to the international arbitration of the ICSID.”
- *Article 8 China/Peru BIT*
**Tza Yap Shum v Peru 2009**

- “the dispute must “include” the determination of the amount of a compensation, and not that the dispute must be restricted thereto.”
- “[...] to give meaning to all the elements of the article, it must be interpreted that the words “involving the amount of compensation for expropriation” includes not only the mere determination of the amount but also any other issues normally inherent to an expropriation, including whether the property was actually expropriated in accordance with the BIT provisions and requirements, as well as the determination of the amount of compensation due, if any.”
- *Tza Yap Shum v Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction, 19 June 2009, paras. 151, 188.

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**Narrow dispute settlement clauses**

- “1. Any dispute arising out of an investment, between a Contracting Party and an investor of the other Contracting Party, concerning the amount or the conditions of payment of a compensation pursuant to Article 4 of this Agreement, or the transfer obligations pursuant to Article 5 of this Agreement, shall, as far as possible, be settled amicably by the parties to the disputes.
- 2. If a dispute pursuant to para. 1 above cannot be amicably settled within six months as from the date of a written notice containing sufficiently specified claims, the dispute shall, unless otherwise agreed, be decided upon the request of the Contracting Party or the investor of the other Contracting Party by way of arbitral proceedings in accordance with the UNCITRAL Arbitration Rules, as effective at the date of the motion for the institution of the arbitration proceedings.”
- Article 8 Austria/Czechoslovakia BIT 1990
**Austrian Airlines 2009**

- Article 8(1) Austria/Czechoslovakia BIT 1990 meant that only disputes ‘concerning the amount or the conditions of payment of a compensation’ can be submitted to arbitration. The scope of Article 8 is therefore limited to disputes about the amount of the compensation and does not extend to the review of the principle of expropriation.

  - *Austrian Airlines AG v. The Slovak Republic, Final Award, 9 October 2009.*

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**MFN and dispute settlement clauses**

- “Each Contracting Parties shall accord to investors of the other Contracting Party and to their investments treatment that is no less favourable than that which it accords to its own investors or to investors of any third State and their investments.”

  - Article 3(1) Austria/Czechoslovakia BIT 1990
MFN Clauses

• “Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.”
  • 10.3(1) Chile-US Free Trade Agreement

MFN Clauses

• “In all matters subject to this Agreement, this treatment shall not be less favorable than that extended by each Party to the investments made in its territory by investors of a third country.”
  • Article IV(2) Argentina-Spain BIT
**Maffezini approach**

- “[I]f a third party treaty contains provisions for the settlement of disputes that are more favorable to the protection of the investor’s rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favored nation clause […]”

**Maffezini endorsed**

- BITs include “as a distinctive feature special dispute settlement mechanisms not normally open to investors. Access to these mechanisms is part of the protection offered under the Treaty. It is part of the treatment of foreign investors and investments and of the advantages accessible through a MFN clause.”
- *Siemens v. Argentina*, Decision on Jurisdiction 2004, para. 120.
**Maffezini endorsed**

- “Unless it appears clearly that the state parties to a BIT or the parties to a particular investment agreement settled on a different method for resolution of disputes that may arise, most-favored-nation provisions in BITs should be understood to be applicable to dispute settlement.”
- Gas Natural v. Argentina, Decision on Jurisdiction 2005, para. 49

**Maffezini rejected**

- “[A]n MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them.”
Maffezini rejected

• “In these circumstances, to invoke the MFN clause to embrace the method of dispute resolution is to subvert the intention of the parties to the basic treaty, who have made it clear that this is not what they wish.”
  
  • Telenor Mobile Communications A.S. v. Republic of Hungary, Award 2006, para. 95

Maffezini rejected

• “In the absence of language or context to suggest the contrary, the ordinary meaning of ‘investments shall be accorded treatment no less favourable than that accorded to investments made by investors of any third State’ is that the investor’s substantive rights in respect to the investments are to be treated no less favourable than under a BIT between the host State and a third State. It is one thing to stipulate that the investor is to have the benefit of MFN treatment but quite another to use a MFN clause in a BIT to bypass a limitation in the settlement resolution clause of the very same BIT when the Parties have not chosen language in the MFN clause showing an intention to do this.”
  
  • Wintershall Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/04/14, Award, 8 December 2008, para. 168.
Maffezini rejected

• The distinction between substantive rights and remedial procedures found in the BIT’s structure “suggests strongly that the “treatment” of “investments” for which MFN rights were granted was intended to refer only to the scope of the substantive rights identified and adopted in Articles II-VI.”
• Kılıç İnşaat İthalat Ihracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan, ICSID Case No. ARB/10/1, Award, 2 July 2013, para. 7.3.9.

ICSID

• The Centre for Settlement of Investment Disputes (ICSID) was set up by the
• 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States
ICSID jurisdiction

- Article 25 ICSID Convention:
- “(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.”

Investment

- “27. No attempt was made to define the term ‘investment’ given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of dispute which they would or would not consider submitting to the Centre (Article 25(4)).”
- World Bank Executive Directors’ Report
Investment

“[…] the project in question should have a certain duration, a regularity of profit and return, an element of risk, a substantial commitment and that it should constitute a significant contribution to the host State’s development.”


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Investment

- “[T]he notion of investment implies the presence of the following elements:
  
  (a) a contribution of money or other assets of economic value, (b) a certain duration, (c) an element of risk, and (d) a contribution to the host State’s development.”

Divergence in practice

• *Patrick Mitchell v Democratic Republic of the Congo*, ICSID Case No ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006, para 25/33;

• *Malaysian Historical Salvors v Malaysia*, ICSID Case No ARB/05/10, Award on Jurisdiction 17 May 2007, para 70/144

**Mitchell v. Congo**

• The *Mitchell ad hoc* Committee placed particular emphasis on the last aspect, the “contribution to the economic development of the host country”. In its view, the services of “Mitchell & Associates”, a law-firm operating in the host State, did not constitute an investment within the meaning of the ICSID Convention.

**Malaysian Historical Salvors v. Malaysia**

- “The Tribunal finds that [...] the Contract did not make any significant contributions to the economic development of Malaysia. The Tribunal considers that these factors indicate that, while the Contract did provide some benefit to Malaysia, they did not make a sufficient contribution to Malaysia’s economic development to qualify as an “investment” for the purposes of Article 25(1) or Article 1(a) of the BIT.”
- *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction, 17 May 2007, para. 143.

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**Malaysian Historical Salvors v. Malaysia**

- “While the Jurisdictional Approach, strictly defined, requires that all the established hallmarks of “investment” must be present before a contract can even be considered as an “investment,” the Typical Characteristics Approach does not necessarily mean that a tribunal would find that there is an “investment,” even if one or more of the established hallmarks of “investment” were missing.”
- *Malaysian Historical Salvors v. Malaysia*, para. 70.
Malaysian Historical Salvors v. Malaysia

• According to Malaysian Historical Salvors v. Malaysia, ICSID tribunals “tend to adopt an empirical rather than a doctrinaire approach in determining whether there is an “investment” within Article 25(1)” and the Tribunal would adopt a “a fact-specific and holistic assessment.”
  *Malaysian Historical Salvors v. Malaysia*, para. 106.

Malaysian Historical Salvors v. Malaysia – Annulment 2009

• “The Committee fully appreciates that the ground for annulment set forth in Article 52(1)(b) of the ICSID Convention specifies that “the Tribunal has manifestly exceeded its powers.” It is its considered conclusion that the Tribunal exceeded its powers by failing to exercise the jurisdiction with which it was endowed by the terms of the Agreement and the Convention, and that it “manifestly” did so, for these reasons:
  • (a) it altogether failed to take account of and apply the Agreement between Malaysia and the United Kingdom defining “investment” in broad and encompassing terms but rather limited itself to its analysis of criteria which it found to bear upon the interpretation of Article 25(1) of the ICSID Convention; […]”
Malaysian Historical Salvors v. Malaysia – Annulment 2009

- “[…] (b) its analysis of these criteria elevated them to jurisdictional conditions, and exigently interpreted the alleged condition of a contribution to the economic development of the host State so as to exclude small contributions, and contributions of a cultural and historical nature;
- (c) it failed to take account of the preparatory work of the ICSID Convention and, in particular, reached conclusions not consonant with the travaux in key respects, notably the decisions of the drafters of the ICSID Convention to reject a monetary floor in the amount of an investment, to reject specification of its duration, to leave ‘investment’ undefined, and to accord great weight to the definition of investment agreed by the Parties in the instrument providing for recourse to ICSID.”
- Malaysian Historical Salvors, SDN, BHD v. Malaysia, ICSID Case No. ARB/05/10, Annulment Decision, 16 April 2009, para. 80.

Fakes v. Turkey 2010

- “[…] the principles of good faith and legality cannot be incorporated into the definition of Article 25(1) of the ICSID Convention without doing violence to the language of the ICSID Convention: an investment might be “legal” or “illegal,” made in “good faith” or not, it nonetheless remains an investment. The expressions “legal investment” or “investment made in good faith” are not pleonasms, and the expressions “illegal investment” or “investment made in bad faith” are not oxymorons.”
- Saba Fakes v. Republic of Turkey, ICSID Case No. ARB/07/20, Award (July 14, 2010), para. 112.
Fakes v. Turkey 2010

• “[...] that the criteria of (i) a contribution, (ii) a certain duration, and (iii) an element of risk, are both necessary and sufficient to define an investment within the framework of the ICSID Convention. In the Tribunal’s opinion, this approach reflects an objective definition of „investment“ that embodies specific criteria corresponding to the ordinary meaning of the term „investment“, without doing violence either to the text or the object and purpose of the ICSID Convention.”

• Saba Fakes v. Republic of Turkey, ICSID Case No. ARB/07/20, Award (July 14, 2010), para. 110.

Fakes v. Turkey 2010

• “[...] that while the preamble refers to the “need for international cooperation for economic development,” it would be excessive to attribute to this reference a meaning and function that is not obviously apparent from its wording. In the Tribunal’s opinion, while the economic development of a host State is one of the proclaimed objectives of the ICSID Convention, this objective is not in and of itself an independent criterion for the definition of an investment.”

• Saba Fakes v. Republic of Turkey, ICSID Case No. ARB/07/20, Award (July 14, 2010), para. 111.
**KT Asia v. Kazakhstan 2013**

- “[…] the objective definition of investment under the ICSID Convention and the BIT comprises the elements of a contribution or allocation of resources, duration, and risk, which includes the expectation (albeit not necessarily fulfilled) of a commercial return.”

**Ambiente Ufficio v. Argentina 2013**

“Following Professor Schreuer’s approach, the criteria assembled in the *Salini* test, while not constituting mandatory prerequisites for the jurisdiction of the Centre in the meaning of Art. 25 of the ICSID Convention, may still prove useful, provided that they are treated as guidelines and that they are applied in conjunction and in a flexible manner. In particular, they may help to identify, and exclude, extreme phenomena that must remain outside of even a broad reading of the term “investment” in Art. 25 of the ICSID Convention.”

Examples of investments identified by ICSID tribunals

- building and operation of hotels and tourism resort projects
- the production of fibres and textiles,
- the mining of minerals,
- the exploration, exploitation and distribution of petroleum products,
- the manufacture of plastic bottles,
- the construction and operation of a fertilizer factory,
- aluminium smelter,
- the conversion, equipping and operation of fishing vessels,
- maritime transport of minerals,
- shrimp farming,
- banking, the provision of loans, etc.

Additional Issue: “Investment” according to BITs

- “A two-fold test must therefore be applied in determining whether this Tribunal has the competence to consider the merits of the claim: whether the dispute arises out of an investment within the meaning of the Convention and, if so, whether the dispute relates to an investment as defined in the Parties’ consent to ICSID arbitration, in their reference to the BIT and the pertinent definitions contained in Article 1 of the BIT.”
Investment Definitions in BITs

The term ‘investments’ comprises every kind of asset, in particular: (a) movable and immovable property as well as other rights in rem, such as mortgages, liens and pledges; (b) shares of companies and other kinds of interest in companies; (c) claims to money which has been used to create an economic value or claims to any performance having an economic value; (d) copyrights, industrial property rights, technical processes, trade-marks, trade-names, know-how, and good-will; (e) business concessions under public law, including concessions to search for, extract and exploit natural resources […]

Germany-Guyana BIT 1989

Investment Definitions in BITs

“Investment” means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:

• (a) an enterprise;
• (b) shares, stock, and other forms of equity participation in an enterprise;
• (c) bonds, debentures, other debt instruments, and loans;
• (d) futures, options, and other derivatives;
• (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;…

2004 US Model BIT
Protection only for “legal” investments?

“[I]nvestment” defined as “any kind of asset accepted in accordance with the respective laws and regulations of either Contracting State.”

Article 1(1) Germany/Philippines BIT

Legality requirements

- “This Agreement shall apply only to investments brought into, derived from or directly connected with investments brought into the territory of any Contracting Party by nationals or companies of any other Contracting Party and which are specifically approved in writing and registered by the host country and upon such conditions as it deems fit for the purposes of this Agreement.”
- Article II of the 1987 ASEAN Agreement for the Promotion and Protection of Investments
Arbitral Practice I

• “This provision refers to the validity of the investment and not to its definition. More specifically it seeks to prevent the Bilateral Treaty from protecting investments that should not be protected, particularly because they would be illegal.”
  

Arbitral Practice II

“[…] express requirement of approval in writing and registration of a foreign investment if it is to be covered by the Agreement. Such a requirement is not universal in investment protection agreements. […] In this respect Article II goes beyond the general rule that for a foreign investment to enjoy treaty protection it must be lawful under the law of the host State.”

• Yaung Chi Oo Trading Pte Ltd v Government of the Union of Myanmar, ASEAN Case No ARB/01/1 31 March 2003, 42 ILM 540 (2003), para. 58.
Recent Problems – *Inceysa*

- “[T]he foreign investor cannot seek to benefit from an investment effectuated by means of one or several illegal acts and, consequently, enjoy the protection granted by the host State, such as access to international arbitration to resolve disputes, because it is evident that its act had a fraudulent origin and, as provided by the legal maxim, ‘nobody can benefit from his own fraud’.”

Recent Problems – *Fraport*

- “In this case, the comportment of the foreign investor, as is clear from its own records, was egregious and cannot benefit from presumptions which might ordinarily operate in favour of the investor.”
- “[T]he BIT explicitly and reiteratedly required that an investment, in order to qualify for BIT protection, had to be in accordance with the host state’s law.”
Recent Problems – *Kardassopoulus*

• “A State thus retains a degree of control over foreign investments by denying BIT protection to those investments that do not comply with its laws. [...] This control, however, relates to the investor’s actions in making the investment. It does not allow a State to preclude an investor from seeking protection under the BIT on the ground that its own actions are illegal under its own laws.”

• *Ioannis Kardassopoulus v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007, para. 182.

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*Phoenix v. Czech Republic*

“To summarize all the requirements for an investment to benefit from the international protection of ICSID, the Tribunal considers that the following six elements have to be taken into account:

1 – a contribution in money or other assets;
2 – a certain duration;
3 – an element of risk;
4 – an operation made in order to develop an economic activity in the host State;
5 – assets invested in accordance with the laws of the host State;
6 – assets invested *bona fide*.”

• *Phoenix v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para 114.
Investor

- Article 25 ICSID Convention:
  - “(2) “National of another Contracting State” means:
  - a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and …”

Investor

- Article 25 ICSID Convention:
  - “…
  - b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.”
Nationality

- “The origin of the capital used to acquire these assets is not relevant to the question of jurisdiction under the Convention. In our view, the ICSID Convention contains no inchoate requirement that the investment at issue in a dispute have an international character in which the origin of the capital is decisive.“
- *Tokios Tokélés v Ukraine*, ICSID Case No ARB/02/18, Decision on Jurisdiction, 2004, para 81.

Treaty Shopping

- “It is not uncommon in practice, and – absent a particular limitation – not illegal to locate one’s operations in a jurisdiction perceived to provide a beneficial regulatory and legal environment in terms, for example, of taxation or the substantive law of the jurisdiction, including the availability of a BIT.”
Applicable law in investment arbitration

- “The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.”
- Article 42(1) ICSID Convention

BIT choice of law

- “The arbitration tribunal addressed in accordance with paragraph (5) of this Article shall decide on the basis of the law of the Contracting Party which is a party to the dispute (including its rules on the conflict of law), the provisions of the present Agreement, special Agreements concluded in relation to the investment concerned as well as such rules of international law as may be applicable.”
- Article 10 (7) Argentina-Netherlands BIT
NAFTA

• “A Tribunal established under this Subchapter shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.”
• Article 1130: Governing Law

Energy Charter Treaty

• “A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.”
• Article 26(6) ECT
Absence of a chosen law

• “[The Tribunal] must respect the provisions of the second part of Article 42(1) of the ICSID Convention, i.e., in the absence of an agreement, the Tribunal shall apply Ecuadorian law, including its rules of private international law and such rules of international law as may be applicable.”

International law’s role

• “This Tribunal notes that Article 42(1) refers to the application of host-state law and international law. If there are no relevant host-state laws on a particular matter, a search must be made for the relevant international laws. And, where there are applicable host-state laws, they must be checked against international laws, which will prevail in case of conflict. Thus international law is fully applicable and to classify its role as “only” “supplemental and corrective” seems a distinction without a difference.”
• *Amco v. Indonesia*, Resubmitted Case: Award, 5 June 1990, 1 ICSID Reports 580.
International law’s role

- “What is clear is that the sense and meaning of the negotiations leading to the second sentence of Article 42(1) allowed for both legal orders to have a role. The law of the host State can indeed be applied in conjunction with international law if this is justified. So too international law can be applied by itself if the appropriate rule is found in this other ambit.”


ICSID Institutional Support

- Keeping lists ("panels") of possible arbitrators
- Screening and registering arbitration requests
- Assisting in the constitution of arbitral tribunals and the conduct of proceedings
- Adopting rules and regulations
- Drafting model clauses for investment agreements
High Level of Effectiveness

- Consent may not be unilaterally withdrawn (Art. 25 para. 1);
- Arbitral tribunals have the exclusive competence to decide on their own jurisdiction (Art. 41 para. 1);
- Awards may not be disregarded or challenged on the ground of nullity except under the Convention’s own annulment procedure (Art. 52) and
- Awards are binding and enforceable (Arts. 53, 54).

ICSID Procedure

- Request for Arbitration to ICSID SG
- Usually three member arbitral tribunals
- Written
- Oral phase
- Award
- Rectification
Request for Arbitration

- “(1) Any Contracting State or any national of a Contracting State wishing to institute arbitration proceedings shall address a request to that effect in writing to the Secretary-General who shall send a copy of the request to the other party.
- (2) The request shall contain information concerning the issues in dispute, the identity of the parties and their consent to arbitration in accordance with the rules of procedure for the institution of conciliation and arbitration proceedings.
- (3) The Secretary-General shall register the request unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre. He shall forthwith notify the parties of registration or refusal to register."

- Article 36 ICSID Convention

Arbitrators

- “(1) Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.
- (2) The Chairman, in designating persons to serve on the Panels, shall in addition pay due regard to the importance of assuring representation on the Panels of the principal legal systems of the world and of the main forms of economic activity."

- Article 14 ICSID Convention
ICSID Awards

• “(1) The Tribunal shall decide questions by a majority of the votes of all its members.
• (2) The award of the Tribunal shall be in writing and shall be signed by the members of the Tribunal who voted for it.
• (3) The award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based.
• (4) Any member of the Tribunal may attach his individual opinion to the award, whether he dissents from the majority or not, or a statement of his dissent.
• (5) The Centre shall not publish the award without the consent of the parties.”
• Article 48 ICSID Convention

Costs

• “In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.”
• Article 61(2) ICSID Convention
Annulment

- Article 52 ICSID Convention:
- “(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.”

Manifest excess of powers

- “As interpreted by various ad hoc Committees, the term “manifest” means clear or “self-evident.” Thus, even if a Tribunal exceeds its powers, the excess must be plain on its face for annulment to be an available remedy. Any excess apparent in a Tribunal’s conduct, if susceptible of argument “one way or the other,” is not manifest. As one commentator has put it, “If the issue is debatable or requires examination of the materials on which the tribunal’s decision is based, the tribunal’s determination is conclusive.”
Manifest excess of powers

- Exercise of jurisdiction
- Erroneous non-exercise of jurisdiction
  Vivendi
- Failure to apply the proper law, not mere misapplication

Failure to apply the proper law

- “The law applied by the Tribunal will be examined by the ad hoc Committee, not for the purpose of scrutinizing whether the Tribunal committed errors in the interpretation of the requirements of applicable law or in the ascertainment or evaluation of the relevant facts to which such law has been applied. Such scrutiny is properly the task of a court of appeals, which the ad hoc Committee is not. The ad hoc Committee will limit itself to determining whether the Tribunal did in fact apply the law it was bound to apply to the dispute. Failure to apply such law, as distinguished from mere misconstruction of that law, would constitute a manifest excess of powers on the part of the Tribunal and a ground for nullity under Articles 52(1)(b) of the Convention. The ad hoc Committee has approached this task with caution, distinguishing failure to apply the applicable law as a ground for annulment and misinterpretation of the applicable law as a ground for appeal.”

- Amco v. Indonesia, Decision on Annulment, 16 May 1986, 1 ICSID Reports 509, 515
Annulment ≠ appeal

• An *ad hoc* Committee must not “substitute its own views for those of the Tribunal, but merely […] pass judgment on whether the manner in which the Tribunal carried out its functions met the requirements of the ICSID Convention.”


Recent borderline cases

• “Notwithstanding the identified errors and lacunas in the Award, it is the case in the end that the Tribunal applied Article XI of the Treaty. Although applying it cryptically and defectively, it applied it. There is accordingly no manifest excess of powers.”

Poor Reasoning is not enough

• “Throughout its consideration of the Award, the Committee has identified a series of errors and defects. The Award contained manifest errors of law. It suffered from lacunae and elisions. All this has been identified and underlined by the Committee.”

• *CMS Gas Transmission Company v The Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Annulment, 25 September 2007, para. 158.

Serious departure from a fundamental rule of procedure

• “In order to be a “serious” departure from a fundamental rule of procedure, the violation of such a rule must have caused the Tribunal to reach a result substantially different from what it would have awarded had such rule been observed. In the words of the *ad hoc* Committee’s Decision in the matter of *MINE*, “the departure must be substantial and be such as to deprive a party of the benefit or protection which the rule was intended to provide.”

Serious departure from a fundamental rule of procedure

• “It is fundamental, as a matter of procedure, that each party is given the right to be heard before an independent and impartial tribunal. This includes the right to state its claim or its defense and to produce all arguments and evidence in support of it. This fundamental right has to be ensured on an equal level, in a way that allows each party to respond adequately to the arguments and evidence presented by the other.”


Failure to state reasons

• a total absence of reasons for the award, including the giving of merely frivolous reasons;

• a total failure to state reasons for a particular point, which is material for the solution;

• contradictory reasons; and

• insufficient or inadequate reasons, which are insufficient to bring about the solution or inadequate to explain the result arrived at by the Tribunal.

• *Soufraki v. UAE*, Decision on Annulment, 5 June 2007, para. 126.
Delays through ICSID annulment

- ICSID annulment originally conceived of as a limited review of the integrity of the arbitral process, not an appeals mechanism
- In practice, close award scrutiny by ad hoc Committees
- Recent tendency of quasi-automatic annulment requests

Limiting the Annulment Threat

- Annulment as a right of the parties
- Self-discipline of the ad hoc committees
- Claimants may look to alternatives (UNCITRAL, etc.)
Restricted role acknowledged

- “The role of an ad hoc committee in the ICSID system is a limited one. It cannot substitute its determination on the merits for that of the tribunal. Nor can it direct a tribunal on a resubmission how it should resolve substantive issues in dispute. All it can do is annul the decision of the tribunal: it can extinguish a res judicata but on a question of merits it cannot create a new one.”

  - MTD Equity Sdn. Bhd. & MTD Chile S.A. v Chile, ICSID Case No. ARB/01/7, Decision on Annulment, 21 March 2007, para. 54.

Finality of Awards

- “(1) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.”

  - Article 53 ICSID Convention
Enhanced Recognition and Enforcement of ICSID Awards

- Article 54 ICSID Convention:
  - “(1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.”

State Immunity as Remaining Obstacle

- Article 55 ICSID Convention:
  - “Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.”
Waiver of Immunity

• ICSID Model clause:
• “The Host State hereby waives any right of sovereign immunity as to it and its property in respect of the enforcement and execution of any award rendered by an Arbitral Tribunal constituted pursuant to this agreement.”

Rules on Enforcement Immunity

• UK State Immunity Act 1978.
Assets Immune from Enforcement

- "No post-judgment measures of constraint, such as attachment, arrest and execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:
  - (a) the State has expressly consented to the taking of such measures […]
  - (b) the State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding; or
  - (c) it has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum, provided that post-judgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed."
- Article 19 UN Convention.

Assets Immune from Enforcement

- "1. The following categories, in particular, of property of a State shall not be considered as property specifically in use or intended for use by the State for other than government non-commercial purposes under article 19 subparagraph (c):
  - (a) property, including any bank account, which is used or intended for use for the purposes of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations, or delegations to organs of international organizations or to international conferences; […]\]
Assets Immune from Enforcement

- (b) property of a military character or used or intended for use in the performance of military functions;
- (c) property of the central bank or other monetary authority of the State;
- (d) property forming part of the cultural heritage of the State or part of its archives and not placed or intended to be placed on sale;
- (e) property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale.

Article 21 UN Convention

**LETCO v. Liberia**

1) Registration fees and other taxes due from ships flying the Liberian flag were not property "used for a commercial activity in the United States."

*LETCO v. Liberia*, District Court, S.D.N.Y., 12 December 1986, 2 ICSID Reports 385.
2) "The Court, however, declines to order that if any portion of a bank account [mostly used for embassy purposes] is used for a commercial activity then the entire account loses its immunity."

*LETCO v. Liberia*, District Court, D.C., 16 April 1987, 2 ICSID Reports 390.
**AIG v. Kazakhstan**

*AIG Capital Partners Inc. and CJSC Tema Real Estate Company v. Republic of Kazakhstan, Award, 7 October 2003, 11 ICSID Reports 7*

“Given the wording of Sec. 14(4), then the property of a State’s central bank (or other monetary authority) must enjoy complete immunity from the enforcement process in the UK courts. [...]”

*AIG Capital Partners Inc. and Another v. Republic of Kazakhstan (National Bank of Kazakhstan Intervening), High Court, Queen’s Bench Division (Commercial Court), 20 October 2005, [2005] EWHC 2239 (Comm)*

**Benvenuti & Bonfant v. Congo**

*Benvenuti & Bonfant v. Congo, Award, 15 August 1980, 1 ICSID Reports 330*

“BBC is a limited company whose capital is held in part by various foreign banks including [...]. On the basis of this finding the *Cour d’appel* was entitled to conclude that BBC should not be regarded as an emanation of the State of the Congo, from which it is distinct, and that the Benvenuti and Bonfant Company is not therefore a creditor of BBC since its debtor is in fact the State of the Congo.”

Alternative Enforcement Mechanisms?

“[A] State’s refusal to enforce an ICSID award may have a negative effect on this State’s position in the international community with respect to the continuation of international financing or the inflow of other investments.”


Alternative Enforcement Mechanisms?

“When a dispute over default, expropriation, or governmental breach of contract comes to the attention of a Bank staff member, the staff member informs the country department (CD) director and the Legal Department (LEG). In consultation with LEG, the CD director recommends a Bank position to the Regional vice president (RVP). If, on this basis, the RVP decides not to make any new loans to the country, the RVP informs the relevant managing director and the Senior Vice President and General Counsel.”

Conclusion

- Voluntarily compliance
- Enforcement in national courts rare
- Effective system
- Important differences between ICSID and non-ICSID enforcement
- State immunity as most serious hurdle to enforcement

*Sedelmayer v. Russian Federation*

*Sedelmayer v. Russian Federation, Award 7 July 1998*

Various enforcement attempts in German courts:

1) third-party garnishment order directed against a German airline owing flight charges to the host State stemming from over-flight, transit and landing rights – held impermissible because claims to flight charges served governmental purposes

*Sedelmayer v. Russian Federation, German Federal Supreme Court, Order VII ZB 9/05, 4 October 2005.*
2) Third-party garnishment directed against the Deutsche Bundesbank and a commercial bank where the Russian Federation owned accounts was upheld because the sovereign purpose of these bank accounts were not substantiated.


3) Third-party garnishment directed against tenants of the Respondent in a central Berlin shopping district at Friedrichstraße was permitted because “such claims do not stem from the execution of sovereign purposes but from the debtor’s participation in normal business life in Germany.”