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The Role of ICSID in International Economic Law

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ABSTRACT

In order to provide a venue for the settlement of international investment disputes, the International Centre for Settlement of Investment Disputes was founded in 1966. It currently has 158 member states and has handled about 70% of all investor-state cases that are known to exist. Particularly in the 2006 and 2022 modifications to those regulations, the International Centre for Settlement of Investment Disputes has demonstrated a leading role in modernizing the processes for investor-state dispute resolution.

Keywords: *ICSID : International Centre for Settlement of Investment Disputes ; AF : Additional Facility.*

I. INTRODUCTION

After World War II, many of the most durable institutions of international economic law were founded, realizing the connection between international economic dispute settlement and world peace, security, and prosperity. One such organization was the International Centre for Settlement of Investment Disputes, or ICSID. Several previous attempts to define international investment commitments and offer a venue for their resolution served as the model for ICSID. The foundation for the creation of ICSID was laid by the 1959 Abs-Shawcross Draft Convention, the 1962 Organization for Economic Cooperation and Development Draft Convention on Investments Abroad, and a 1960 Report by the Secretary-General of the United Nations suggesting an international body to arbitrate investor-state disputes. Local events also served as inspiration for ICSID, most notably the increasing number of governments and foreign investors turning to the World Bank President and his good offices to settle some of the most complicated international investment disputes of the day. The World Bank's General Counsel at the time, Aron Broches, started talking with the bank's Executive Directors in 1961 about establishing a mechanism for resolving disputes involving foreign investments. The ICSID Convention was made available for signature in 1965, and after being ratified by the first 20 states, it became operative in October 1966. By November 2022, there were 158 ratified

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members of ICSID. The ICSID Convention established the ICSID (the Centre). The Centre was divided into a member-driven governance arm called the Administrative Council and an impartial Secretariat tasked with administering disputes within its jurisdiction.[4] According to the agreement in writing between the parties to the dispute, the Center was to handle the arbitration and conciliation of "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 Center by that state) and a national of another contracting state." By February 1967, a set of interim rules and regulations had been written. These were approved at the September 1967 Annual Meeting with a few minor modifications, and they became operative on January 1, 1968. The Administrative Council gave its approval in September 1978 to create an extra set of regulations known as the ICSID Additional Facility (AF). The AF provided fact-finding, conciliation, and arbitration in situations when the foreign investor's home state or the state party were both ICSID contracting states, but not both. The ICSID Convention's Articles 53–55 and the right to request annulment under Article 52, among other protections, did not apply to AF proceedings. In contrast, the AF procedural standards were comparable to those under the Convention.

At the Center, the first thirty years were largely tranquil. Initiated in 1972, the first ICSID lawsuit was a hotel construction and operation contract between Holiday Inns and Morocco. Merely 69 ISDS cases, or an average of two cases annually, had been administered by ICSID by 1999. Out of all those cases, conciliations accounted for only three; this is still the case today. Consent in investment contracts formed the basis of the majority of the early instances. In fact, Asian Agricultural Products Ltd. v. Republic of Sri Lanka was the first lawsuit based on consent in an investment treaty, brought in 1987. Things picked up speed after 1999. An additional 819 cases were administered by ICSID from January 1, 2000, and June 30, 2022. By the end of June 2022, ICSID had recorded 888 cases under the AF and the ICSID Convention, solidifying its position as the primary facility in this area. Roughly 70% of all known investment disputes have been handled by ICSID overall through the use of the ICSID Convention, ICSID AF, UNCITRAL Rules, and ad hoc proceedings. A bilateral or multilateral investment treaty's assent has served as the basis for over 75% of all ICSID cases. This is a reflection of an international trend in policy development known as the "treatification" of international investment law. There were 3301 known international investment agreements as of August 19, 2022, of which 2566

[4] See ICSID Convention, Arts. 1–11, above n 5. See also *Report of the Executive Directors on the ICSID Convention*, https://icsid. worldbank.org/resources/rules-and-regulations/convention/report-of-the-executive-directors (visited 22 November 2022).

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were active. Almost every state has signed one or more investment agreements, with over 200 states currently holding such agreements. Most of agreements were signed after 1992 and involve consent in advance for ICSID to mediate or resolve disputes. The remarkable net increase in worldwide foreign direct investment (FDI) over the previous 30 years—from 204,888 million in 1990 to 1,582,310 million in 2021—is also reflected in ICSID's expanding caseload. It goes without saying that as cross-border investment increases, so does the possibility of disputes and the requirement for ICSID as a venue for their resolution.

II. THE CONTRIBUTIONS OF ICSID

Numerous elements have contributed to ICSID's success. Above all, it satisfies a very genuine demand that nations and investors have. Before ICSID, international investors frequently had little to no redress against sovereign governments, which led to higher transaction costs or the complete loss of vital investment. The existence of ICSID guarantees international investors a fair and efficient forum to settle their conflicts with sovereign states and, in the event of a successful resolution, to acquire a legally binding verdict. The Convention's layout is specifically designed to accommodate the special features of the field. For instance, given the evident desire of nations to negotiate their investment commitments on an individual basis, the choice to restrict ICSID's function to procedural options rather than to attempt to codify the substantive obligations of international investment law has proven especially wise. In addition to being unique to the rules of no other institution, the choice to provide a restricted post-award remedy in the form of annulment, along with the streamlined recognition and enforcement process in section 6 of the Convention, has proven to be extremely beneficial. Particularly throughout the past 25 years, ICSID has established itself as a leader in advancing and reforming the field of investment arbitration. This has made a significant difference in the level of openness in ICSID hearings. Newly issued rulings are published regularly, and every case is monitored on the ICSID website. Every six months, ICSID releases comprehensive statistics that include information on the number of cases, the nature of consent, the parties' success rate, the economic sectors involved, the gender and nationality of the arbitrators, and other topics of general public interest. It is impossible to overstate the value of transparency in ISDS since it promotes more trust in the system overall and enables more consistent development of the relevant legislation. A corpus of substantive and procedural international investment law has been substantially created by ICSID tribunals and ad hoc committees as a result of the rise in cases.

For instance, ICSID tribunals have developed a wealth of jurisprudence regarding the definition

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of "investment" as it relates to arbitration proceedings, as well as the availability and use of procedural options like stay of proceedings, bifurcation of proceedings, and provisional measures, to mention a few. Significantly, the ICSID tribunal's jurisprudence has expanded upon the substantive duties found in certain laws and treaties, particularly with the definitions of expropriation, national treatment, fair and equitable treatment, and most-favored nation treatment. Particularly in light of the ongoing modernization of its procedural rules—most notably, the revisions implemented in 2006 and 2022—ICSID's leadership in the sector is clearly visible. In 2006, ICSID took a major step toward increasing the transparency of the process. This was accomplished through a variety of amendments that made case awards and decisions more available to the public, made hearings more open, and allowed third-party participation where it provided a different perspective from the parties and would assist the tribunal in determining a factual or legal issue.[5] The 2006 amendments also introduced the motion for dismissal due to manifest lack of legal merit, which allowed for early dismissal of a claim that was manifestly lacking in legal merit, thus avoiding the cost and time involved in litigating an unmeritorious claim. An even more extensive set of changes was accepted by the member states of ICSID in March 2022. The primary goals of the 2022 revisions were to increase openness, shorten the duration and expense of the legal process, provide parties with a wider range of tools for resolving disputes, and address a number of recent discussions around investment dispute resolution. In particular, the 2022 rules improve transparency by making all orders and decisions public, allowing party-filed submissions to be published, allowing participation by non-disputing treaty parties, and defining secret and protected material.

Through a variety of methods, such as shortened deadlines, the need to issue orders or awards in a limited amount of time, the capacity to group or coordinate similar cases, a focus on case management by the tribunal or Committee, the ability to file documents remotely, and the choice to agree to an accelerated arbitration procedure, these amendments will shorten the time and expense of cases. The ICSID 2022 amendments broaden the range of dispute resolution options available to parties as part of its modernization. For instance, the rules governing conciliation were updated to create a more contemporary alternative conflict resolution procedure. Similarly, best practices in mediation have been incorporated into a set of independent investment mediation standards for the first time. The mediation rules can be applied alone or in conjunction with fact-finding, arbitration, or conciliation processes. The

[5] ICSID Rules 2006, Arbitration Rules, Rules 48(4), 32(2), 37(2), respectively, found at https://icsid.worldbank.org/
resources/publications/rules-and-regulations (visited 22 November 2022).

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fact-finding guidelines have also undergone a comprehensive revision and are still accessible whenever an impartial fact-finding investigation could be helpful in settling an issue pertaining to investments. The AF Rules now include a wider range of situations, including those in which a regional economic integration organization is a disputing party and in which neither the foreign investor nor the contesting state is connected to an ICSID member state. This is a substantial revision to the rules' jurisdiction. Numerous revised regulations tackle the current discourse surrounding the resolution of investment disputes in a broader sense. Provisions requiring disclosure of third-party funding to prevent unintentional conflicts of interest between the donor and a tribunal member are an excellent illustration of this. A rule on security for costs that strikes a balance between the demands of both parties and a list of criteria that must be taken into account when awarding costs are two ways that additional provisions update the rules on costs.

III. Current and Future Work

ICSID's top goal remains handling cases in an effective, knowledgeable, and timely way. Over the coming years, ICSID will pay close attention to making sure that the revised regulations are applied correctly and benefit all stakeholders. This will involve a significant amount of training for officials and attorneys, particularly with regard to new processes like mediation. Simultaneously, ICSID is pursuing additional significant initiatives, such as endeavors to broaden the range of arbitrators. ICSID and the UNCITRAL Secretariat are collaborating on a proposed Code of Conduct for Adjudicators. The Code's fourth draft was published in July 2022, after work on it started in 2020. The Code covers the basic duties of independence and impartiality, adjudicators' capacity to fulfill several responsibilities at once, the disclosure of potential conflicts, and the procedures for enforcing Code requirements. Lastly, it should be mentioned that ICSID has been a major source of technical support for international investment law and that this is still a top priority.

The Center frequently gives speeches to states, the business community, and other organizations regarding the relevant process and handling ICSID cases. Through its many publications, such as the ICSID Review—Foreign Investment Law Journal and many practice recommendations, it has also helped to develop knowledge. This work is being done against a backdrop of many, intersecting global crises, such as food and energy shortages and climate change, to which foreign investment is a critical component of the solution. The fact that ICSID has been successful in creating the environment for increased FDI over the past 25 years indicates that it will continue to be relevant. The Center's solid institutional base and continuous

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modernizations position it to meet these challenges and keep contributing significantly to the field of international economic law.

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