



Review of Some Aspects of Investment Arbitration under the International Centre for Settlement of Investment Disputes

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ABSTRACT

An economic development of the states highly depends upon the flow of private international investment. Whilst the creation of suitable investment climate which would guarantee the fair and equitable treatment of foreign investment within the depoliticised and impartial dispute resolution system had been objective of the World Bank, the International Centre for Settlement of Investment Disputes was established under its auspices. The primary objective of the ICSID Convention has been viewed on facilitating and safeguarding of private international investment through the creation of a favourable investment climate. Arbitration under the ICSID, serves not only in favour of investors but also of host states. Whilst the favourable means are offered to the both parties for dispute resolution according to the major provisions of the Convention, the "[e]xecution of the awards", represent the slight alteration in the disadvantageous position of the foreign investor. The aforementioned alteration as the time consuming process, fulfilled within the state bureaucracy is more sensibly approached by the foreign investors in developing countries, under which the political risk and demand for foreign investment protection is always one of the highest extent. However, by virtue of signing the Convention, the states not only accept the proposed dispute resolution mechanism, but also declare and desire to welcome the foreign investment. As states aforementioned attempts could be related to the creation of the Global Forum for delivering better Investment Climate, the demands of the World Bank in the sphere is one of the most significant importance.

KEYWORDS: ICSID convention, Investment arbitration, Dispute resolution

INTRODUCTION

The globalisation of business activities resulted in flow of private capital across the national boundaries has proved to encourage and improve worldwide economic efficiency and welfare of the nations.¹ As the main participants of the global investment activities have been on one hand, the private investors and on the other, the host states within their governmental bodies, the major problematic issue throughout their cooperation was related to the lack of explicit legally

binding international regulations.² The problems related to legal consideration have been viewed more sensibly since the issue has been resulted in international investment promotion, protection, property expropriation, and the most important, dispute resolution.³ The aforementioned is particularly true in terms of developing countries, where the authorities' domestic policy has often been sought to be intervened in foreign trade and international investment.⁴

The problem of expropriation was highly traced

1 Chukwumerije, O. (1990). ICSID Arbitration and Sovereign Immunity. 19 Anglo-American Law Review, 166, at 166-167.; Brewer, T. L., Young, S. (2000). The Multinational Investment System and Multinational Enterprises. (1st ed.). Oxford University Press, at 11-23.

2 Vuylsteke, C. (1974). Foreign Investment Protection and ICSID Arbitration. 4 Georgia Journal of International Law, 343, at 343-348.

3 Lowenfeld, A. F. (2002). International Economic Law. (1st ed.). Oxford University Press, at 391-415.

4 Chukwumerije, supra note 1, at 166.

after the Russian 1917 Revolution, when the private ownership in land, without any provision of compensation was abolished, resulted within the nationalisation of all banks and assets.⁵ The same problem was highlighted after the Mexican Revolution, resulted in development of the Calvo Doctrine.⁶ The “Wave of Expropriation”⁷ was highly remarkable after the World War II in Eastern European Countries, former colonies, and Latin American Countries.⁸

Whilst the creation of suitable investment climate which would guarantee the fair and equitable treatment of foreign investment within the depoliticised and impartial dispute resolution system had been objective of the World Bank, the International Centre for Settlement of Investment Disputes was established under its auspices.⁹ Convention on the Settlement of Investment Disputes between States and nationals of other States provides the arbitration facilities whilst the host state of a private investor and the state of investor’s nationality are the parties to the Convention, and both the host state and private investor are agreed in written form to ICSID arbitration proceedings.¹⁰ One of the main benefits of the centre, in favour of protection of foreign investors has been highlighted by some respectful commentators that: “While the concept of ‘internationalisation’ of investment contracts may be objectionable, the facility offered by ICSID recognises the demand by foreign investors that the contract not be entirely subject to local law...”¹¹

CONSIDERATIONS UNDER THE PROVISIONS OF THE CONVENTION OF THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES

As the economic development of the states highly depends upon the flow of private international investment, the primary objective of the Convention has been viewed on facilitating and safeguarding of

private international investment through the creation of a favourable investment climate.¹² The fact that arbitration under the ICSID, serves not only in favour of investors but also of host states has been further underlined by the Tribunal in *Amco v Indonesia*.¹³ Despite the lack of the explicit definition of investment under the Convention, the ICSID tribunals have accepted jurisdiction over a wide range of activities, including licensing, construction contracts, concession agreements and manufacturing activities.¹⁴

According to the Convention, the consent of the parties may be established through the arbitration clause or within a simple exchange of letters.¹⁵ Furthermore, consent may also be derived from “the investor’s acceptance of a unilateral offer from the host State if a consent provision is contained in the host’s investment law or in a bilateral treaty with the Contracting state of which the investor is a national”.¹⁶

Under the *Jurisdiction of the Centre*, both the host states and the multinational corporations are able to ground the dispute settlement clause in international law so that deny of the principle agreement will not deprive the other party of its right to resort to the Centre.¹⁷ Giving the references to the particular importance of Customary International Law in terms of investment protection, Vuylsteke (1974, p.350) has argued ‘...the Convention grants a direct internationally binding character to obligations which could not have been secured in a classic arbitration clause... important gaps, as they appeared in the conduct of traditional arbitration procedures, are covered by the

5 Lowenfeld, supra note 3, at 392-393.

6 *Ibid*, at 393-395.

7 *Ibid*, at 405.

8 *Idem*.

9 Feuerle, P. (1977). International Arbitration and Choice of Law under Article 42 of the Convention on the Settlement of Investment Disputes. 4 Yale Studies in World Public Order, 89, at 89-98.

10 Beveridge, F. (2000). The treatment and taxation of foreign investment under international law – Towards international disciplines. (1st ed.). Manchester University Press, at 33-34.

11 *Ibid*, at 34.

12 Schreuer, C. H. (2001). The ICSID Convention: A Commentary. (1st ed.). Cambridge University Press, at 4-5.; Rowart, M. D. (1992). Multilateral Approach to Improving the Investment Climate of Developing Countries: The Case of ICSID and MIGA. 33 Harvard International Law Journal, 103, at 103-105.; Tupman, W. M. (1998). Case Studies in the Jurisdiction of the International Centre for Settlement of Investment Disputes. 35 International and Comparative Law Quarterly, 813, at 813.

13 Amco Asia Corporation and others v Republic of Indonesia (ARB/81/1). (1984). 23 International legal Materials, 351.; <http://www.worldbank.org/icsid/cases/conclude.htm>; Schreuer, supra note 5, at 5.

14 Rowart, supra note 12, at 109.

15 Convention on the settlement of Investment Disputes Between States and Nationals of Other States. (1965). 4 International Legal materials, 532, at 536. Article 25.; Delaume, G. R. (1984). ICSID Arbitration in Practice. 2 International Tax and Business Lawyer, 58, at 60.

16 *Idem*.

17 Article 25(1), supra note 15.; Amerasinghe, C. F. (1977). Dispute Settlement Machinery in Relation Between States and Multinational Enterprises – With Particular Reference to the International Centre for Settlement of International Disputes. 11 International Lawyer, 45, at 48.

general and the specific provisions of the Convention, which complement each other in offering solutions for most foreseeable situations’.

Some capital exporting countries have been considered as being hesitant about imposing the compulsory arbitration under ICSID upon their investors by virtue of the point that they would be deprived of the benefit of diplomatic protection.¹⁸ It has been submitted that the development of diplomatic protection was resulted from the unavailability of international remedies to individuals and corporations under traditional international law.¹⁹ As the protection could not be justified by existence of a legal interest, it depends on the parties to an investment agreement to define the limits of such protection.²⁰ Under the explicit provision in the Convention: “No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute...”²¹ a host state, agreed to arbitrate a dispute with a foreign investor has been assured that the investor’s national state may not give him diplomatic protection or an international claim on his behalf.²²

However, the prohibition laid down in terms of diplomatic protection expires if the opposing “...Contracting State shall have failed to abide by and comply with the award rendered in such dispute”.²³ By virtue of the efforts to balance the interests of all parties involved and to depoliticise the settlement of disputes, ICSID has been considered as a more neutral body than other agencies.²⁴ Referring to the practical implications of the Centre, Rowart (1992, p.108) has argued ‘Despite the inclusion of these provisions [Article 27; 42] in the initial draft of the Convention, the Latin American states remained more hesitant than other LDCs to ratify the Convention...Nonetheless, Costa Rica, El Salvador, and Paraguay became the first Latin American states to sign the Convention in 1981, followed in subsequent years by Argentina, Bolivia, Chile, Ecuador, and Honduras. This small contingent of Latin American signatories indicates the gradual acceptance of ICSID in the Latin American region’.

As the main aspect of diplomatic protection is based upon the requirement that the protected individual or corporation must have the nationality of the

protecting state, the problems regarded to this point could arise whilst the registered office of the company or its place of incorporation do not coincide with the nationality of the shareholders.²⁵ However, under the Convention the question of nationality seems to be more flexibly approached, whilst for the purposes of the *Jurisdiction of the Centre*, the parties are able to establish the nationality of the foreign investor by agreement under Article 25 (2)(b) stating: “...judicial 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 purpose of this Convention”.²⁶ As Vuylsteke (1974, p.357) has argued ‘The Convention is designed to replace the classical pattern of diplomatic protection; principles of interstate responsibility do not apply to claimant under it...while many controversies have arisen in traditional international judicial practice with respect to an alleged nationality for the purpose of diplomatic protection, this is not likely to be the case in the scheme of the Convention’.

Whilst the requirements related to: “The Tribunal shall consist of a sole arbitrator or any uneven number of arbitrators...”²⁷ viewed as one of the Convention’s few mandatory provisions concerning the *Constitution of the Tribunal* designed to avoid uncertainties through the agreement of the parties,²⁸ second part of the provision, within the following Articles,²⁹ based upon the principle of equality, seems more flexible and gives various of opportunities to the parties concerned.³⁰

Tribunal’s approach towards the establishing of substantive law governing the proceedings has been related to the main determining factor in the success of the ICSID arbitration since the early period of its development.³¹ It has been assumed, that by virtue of defining the applicable law to international investments pursuant to procedural terms (in terms of binding constitutive process), the most favourable possibilities for the parties had been accepted.³² Under the wording “...such rules of law as may be agreed by the parties”³³ the freedom of choice is recognised and the parties of the dispute have primary competence and are free by their mutual agreement to determine

18 Chowdhury, S. R. (1992). *The Right to Development in International Law*. (1st ed.). Martinus Nijhoff Publishers, at 121.

19 Schreuer, supra note 12, at 397.

20 Vuylsteke, supra note 2, at 345.

21 Article 27(1), supra note 15.

22 Amerasinghe, supra note 17, at 47.

23 Article 27(1), supra note 15.; Rowart, supra note 12, at 108.

24 *Ibid*, at 107.

25 Schreuer, supra note 12, at 406.

26 *Idem*.

27 Article 37(2) (a), supra note 15.

28 Schreuer, supra note 12, at 472.

29 Article 38, 39, 40, supra note 15.

30 Article 37(2) (b), supra note 15.; Rowart, supra note 12, at 111.

31 Feuerle, supra note 9, at 90-92.

32 *Ibid*, at 99.

33 Article 42 (1), supra note 15.

the issues relevant to choice of applicable law.³⁴ Referring to the circumstances of selecting a particular system of law, Schreuer (2001, p.559) has argued 'The parties may be influenced by a desire to create greater certainty, by a preference for a law with which they or one of them is familiar or by the wish to maximize the legal protection for one of them, most notably the foreign investor'. However, if the parties could not reach the agreement, then according to the residual³⁵ rule "...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".³⁶

According to the references to the scholars of the Convention, it has been defined four specific occasions under which an ICSID Tribunal applies international law,³⁷ namely: "where the parties have so agreed; where the law of the host state calls for the application of international law, including customary international law; where the subject-matter issue is directly regulated by international law; and where the law of the host state or action taken under that law violates international law".³⁸

By virtue of the paramount importance of the choice of law for the final result of the arbitration, it is possible that the parties will find quite difficult to agree on an alternative to the fallback provision of the Convention.³⁹ In the situation concerned, the Convention provides that regardless to what system was accepted by explicit choice, the tribunal is barred from bringing "...in a finding of *non liquet* on the ground of silence or obscurity of the law".⁴⁰

The great significance of the Convention in terms of enforceability of awards has been highly underlined by Dalaume (1983, p.801) '...the great advantage of the Convention over other international conventions regarding the enforcement of foreign arbitral awards is that not even public policy can be raised as a defence against the binding character of ICSID awards'. The Convention, stating: "The awards shall be binding on the parties...Each party shall abide by and comply with the terms of the award"⁴¹, and providing further several remedies, makes it clear that these are the only remedies, and a party may not abide by the award only to the "...extent that enforcement shall

have been stayed pursuant to the relevant provisions of this Convention".⁴² The Convention provides three possible remedies according to its provisions, namely, "Interpretation",⁴³ "Revision",⁴⁴ and "Annulment".⁴⁵

Article 54 (1) of the Convention provides that: "Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations...". The binding nature of the award, as the basic part in the concept of arbitration has often been expressed in terms of *res judicata*.⁴⁶ As mentioned, only "...pecuniary..." awards could be enforced under the Convention, and enforcement regime does not extend to non-pecuniary awards, such as injunctive relief.⁴⁷

Under a private investor's point of view, the most satisfactory dispute resolution process must be associated with the realisation of an award rendered against the state party; otherwise the hope of obtaining redress against a recalcitrant state party would be illusory.⁴⁸ As Chukwumerije (1990, p.178) has argued 'The task for the drafters of the ICSID Convention was to balance the need for a guarantee of enforcement of ICSID awards with the insistence of foreign state that domestic laws of state immunity should not be disturbed'.

Two-level process for enforcement is provided according to the Convention; namely, first stage, related to the recognition and enforcement of the award by each contracting state under the Article 54(1), and second stage, "Execution of the award..." pursuant to Article 54(3) of the Convention.⁴⁹ The execution of an award can be followed after the courts in the country concerned had recognised the award.⁵⁰ Under the Article 54(2) "A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the secretary-General". On the other hand, Article 54(3) provides that "Execution of the award shall be governed by the laws concerning the execution of judgement in force in the State in whose territories such execution is sought". As assumed, the latter stage had made it necessary

34 Amerasinghe, supra note 17, at 47.

35 Schreuer, supra note 12, at 596.

36 Article 42 (1), supra note 15.

37 Lowenfeld, supra note 3, at 459.

38 Idem.

39 Amerasinghe, supra note 17, at 54.

40 Article 42 (2), supra note 15.; *Ibid*, at 54-55.

41 Article 53 (1), supra note 15.

42 Idem.; Amerasinghe, supra note 17, at 55.

43 Article 50, supra note 15.

44 Article 51, supra note 15.

45 Article 52, supra note 15.

46 Schreuer, supra note 12, at 596.

47 Buckley, R. (1992). Now we have come to the ICSID Party: Are its Awards Final and Enforceable?. 14 Sydney Law Review, 358, at 368.

48 Chukwumerije, supra note 1, at 178.

49 Buckley, supra note 47, at 368-369.

50 Article 54, supra note 15.; Chukwumerije, supra note 1, at 178-179.; Amerasinghe, supra note 17, at 55-56.

to use the coercive powers of one state against the property of another.⁵¹ Furthermore, it has to be underlined that at the stage of execution, the laws of the state where execution is sought relating to sovereign immunity will apply, by virtue of the operation of Article 55 of the Convention, stating: "Nothing in Article 54 shall be construed as derogation from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution".⁵² So, whilst the immunity from jurisdiction does not pose any difficulty under the Convention, immunity from the execution has been related to the limitation on the efficacy of the Convention's enforcement procedure.⁵³ Referring to the aforementioned issue, Buckley (1992, p.369) has argued '...the restrictive doctrine of sovereign immunity from execution has grown in influence since the Convention entered into force, particularly in those developed nations where financial centres and assets are likely to be located. Accordingly, the successful party willing to engage in "forum shopping" to locate assets in jurisdictions with narrow immunity doctrines now enjoys good prospects of successfully enforcing award'.

EXPANSION OF THE ICSID ARBITRATION THROUGH THE PROVISIONS OF BILATERAL AND REGIONAL INVESTMENT TREATIES

The proliferation of Bilateral Investment Treaties has been understood in the light of the changing legal climate for private investment over the past few decades; more specifically, by virtue of drafting of the International Centre for the Settlement of Investment Disputes Convention.⁵⁴ Whilst much effort had been made by scholars to find the ways and methods for the promotion of private foreign investment in previous years, the main problem was associated with the lack of an appropriate means of settlement of disputes between foreign investors and the host states.⁵⁵ It has been submitted that, by the existence of such an international forum, it would give private claimants international jurisdiction on substantially the same basis as

states claimants before the International Court of Justice, and thus such clear methods for the settlement of investment disputes would contribute to an improvement of the investment and thereby promote the flow of private foreign capital.⁵⁶

Under the recent American Bilateral Investment Treaties, one of the options available for the arbitration is under the auspices of ICSID.⁵⁷ In terms of the efficiency of ICSID Arbitration, Walde (1998, p.10) has argued 'While the first BITs encouraged submission to international arbitration, the 1965 ICSID convention provided a ready-made mechanism (arbitration rules, procedures, supervision in an institutional setting and an enforcement mechanism)...'.⁵⁸

As there has been increase tendency in many Bilateral and Regional Investment Treaties to submit disputes to the International Centre for the Settlement of Investment Disputes, consent and applicable law to the disputes has remained the cornerstone in the aforementioned case.⁵⁹ One of the conditions when the international law is the applicable one to the disputes "...where the subject-matter or issue is directly regulated by international law, for instance a treaty between the host state and the state of the investor"⁶⁰ has been the most useful category, as numerous of Bilateral Investment Treaties have outlined substantive provisions relating to the obligations of the host state, and have provided for adjudication according to the ICSID Convention as one of the available options for the dispute resolution procedures.⁶¹

The aforementioned is particularly true in terms of the provisions of the Energy Charter Treaty, which has succeeded in achieving the status of a legally binding Convention.⁶² According to the Article 26, entitled: "Settlement of Disputes between an Investor and a Contracting party" of the ECT, compulsory arbitration, at the option of foreign investors against governments for "...an alleged breach of an obligation of the [latter] under Part III [ECT]..."⁶³ which concerns the *promo-*

51 Chukwumerije, supra note 1, at 178.

52 Buckley, supra note 47, at 369.

53 Idem.

54 Gallagher, N., Shore, L. (2004). Bilateral Investment Treaties: Options and Drawbacks. 7(2) International Arbitration Law Review, 49, at 49.; Harten, G. V., Loughlin, M. (2006). Investment Treaty Arbitration as a Species of Global Administrative Law. 17 European Journal of International Law, 121, at 123.

55 Idem.

56 Idem.

57 Lowenfeld, supra note 3, at 484-485.

58 Walde, T. W. (1998). Investment Arbitration under the Energy Charter Treaty – From Dispute Settlement to Treaty Implementation. The Centre for Petroleum and Mineral Law & Policy University of Dundee, Scotland, UK. <http://www.dundee.ac.uk/cepmlp/journal/html/Vol1/article1-10.pdf>

59 Sornarajah, M. (1994). The International law on Foreign Investment. (1st ed.). Cambridge University Press, at 267-268.

60 *Ibid*, at 459.

61 Idem.

62 Article 26 of the Energy Charter Treaty. http://www.en-charter.org/fileadmin/user_upload/document/EN.pdf; Walde, supra note 58, at 2.

63 Idem.

tion and protection of investment, is provided.⁶⁴

According to Article 26 of the Energy Charter Treaty, disputes which had not been settled “amicably”⁶⁵, can be submitted at the choice of the investor to national courts, in according with contractual arbitration or to arbitration under the Treaty, where the Investor can choose arbitration from: the ICSID convention,⁶⁶ and the ICSID based “Additional Facility” (if either home or host state of the investor is not a member of the ICSID Convention).⁶⁷

One of the most significant feature of the ICSID Convention could also be highlighted by virtue of its provisions, aiming at minimising the political influence and thus providing impartial arbitral proceedings which could fairly be treated as crucial assistance for the private investors, especially operating within the heavy industrial projects (included upstream petroleum investment), and thus requiring large capital investment under which the political risk is always one of the great extent.⁶⁸

CONCLUSION

Whilst the favourable means are offered to the both parties for dispute resolution according to the major provisions of the Convention, the “[e]xecution of the awards”⁶⁹, represent the slight alteration in the disadvantageous position of the foreign investor.⁷⁰ The aforementioned alteration as the time consuming process, fulfilled within the state bureaucracy is more sensibly approached by the foreign investors in developing countries, under which the political risk and demand for foreign investment protection is always one of the highest extent.⁷¹

However, it has to be submitted that by virtue of signing the Convention, the states not only accept the proposed dispute resolution mechanism, but also declare and desire to welcome the foreign investment.⁷² As states aforementioned attempts could be related to the creation of the *Global Forum* for delivering better Investment Climate, the demands of the World Bank in the sphere is one of the most significant importance.⁷³

64 Idem; Maniruzzaman, A. F. M. (2004). Energy Charter Treaty Arbitration (Investor State) in the Asia-Pacific Context. 4 International Energy Law and Taxation Review, 101, at 101.; Walde, supra note 58.

65 Article 26 (1) of the Energy Charter Treaty, supra note 62.

66 Article 26 (4) (a) (i) of the Energy Charter Treaty, supra note 62.

67 Article 26 (4) (a) (ii) of the Energy Charter Treaty, supra note 62.; Walde, supra note 58, at 33.

68 Walde, supra note 58, at 4-5.

69 Article 54(3), supra note 15.

70 Buckley, supra note 47, at 369.

71 Walde, supra note 58, at 4-5.

72 “Reinvigorating ICSID with a New Mission and with Renewed Respect for Party Autonomy” Notes: (1992-1993). 33 Virginia Journal of International Law, 123, at 135-153.

73 supra note 5, at 393-395.

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