THE PAVILION OF INTERNATIONAL COMMERCIAL ARBITRATION – ICSID

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ABSTRACT
In the wake of the zeitgeist of Globalization, commercial interests bridge strategic gaps among nation states, thereby blurring lines. International Arbitration, to that extent can be construed to contribute to the creation of a peaceful world through the settlement of disputes between states, among States and Non-State actor as well as at the front of investment and commercial disputes. Contrary to the conventional method of Judicial Settlement, characterized by a Standing Tribunal settling a case, in International Arbitration, the applicable and procedural laws along with the Arbitrators are decided solely by the parties. In the following article, the authors have attempted to reflect on Institutional Arbitration in the light of ICSID and its fundamentals. Thus, ICSID is a niche body delving into Institutional Arbitration, such that the parties consent to adhere to the laws and regulations of it for the purpose of settling commercial disputes. The origin of Investment Arbitration can be traced back to the Mixed Claims Commissions of the 20th Century, especially during the middle of the century when large MNCs obtained important concessions for the extraction of natural resources in developing countries. However, the disputes entailed by such procedure were not backed by commensurate legal remedy, as the recourses were gravely stained in politicization and biased lenses. Hence, disputes pertaining to Concession Contracts required de-politicization as well as a neutral forum for settlement. These thoughts paved the path for eventual establishment of organization like ICSID, the narrative of which is laid out in the further course of text.

Overview:
The International Center for Settlement of Investment Disputes (ICSID) is an inter-governmental organization based in Washington DC. Its mission is to facilitate "the prompt, fair and efficient resolution of international investment disputes". It was established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), which entered into force in 1968 and has been ratified by 156 countries; it also sets up rules on acceptable behavior for states towards foreign capital.

Central to the ICSID Convention is the establishment of individualized rules for each dispute brought before its tribunals. The ICSID Convention provides two principal modes of arbitration: Ad Hoc Arbitration and Conciliation.1

ICSID was initially created with the purpose to stimulate Economic Development through promotion of Foreign Investment by providing a nuclear forum for the Settlement of Investment Disputes.

The Centre has been ascribed the status of "an autonomous international organization" for which the Agreement, with the United Nations Charter as a starting point, places it in an unusual position in terms of

1 L Reed, J Paulsson & N Blackaby, Guide to ICSID Arbitration (2011)
The International Court of Arbitration, for matters requiring judicial determination, functions to settle any disputes that arise between member states relating to the interpretation or application of the ICSID Convention, and its Secretariat.

The ICSID Convention is a Multilateral Treaty that was adopted under the auspices of
the United Nations Conference on Trade and Development (UNCTAD) and takes its name from this body. It entered into force on 10 January 1965. As of July 2012, 114 states are party to it. The convention provides for binding arbitration between two parties such as a government and an investor who has submitted his case to ICSID after one or several conciliation attempts have failed, with no time limitation regarding when events giving rise to the claim must have occurred or been discovered.

Traditionally Developing Nations had opposed setting up an arbitration center within UNCTAD because they feared that it would threaten their sovereignty. They argued that only the UN Security Council has the right to mandate ICSID arbitration in cases where a government is accused of systemic human rights violations or environmental destruction. However, after some years the non-western states were persuaded and now most have signed the convention.

Disputes in ICSID:
The Convention defines two types of dispute: (a) those arising out of Investment Agreements between States and nationals of other States⁵; and (b) disputes over questions involving acts already performed by a Contracting Party which relate to investments in accordance with an Investment Agreement concluded with another Contracting Party prior to a dispute arising between them. The latter category refers to treaty claims, i.e., disputes arising out of pre-existing treaty obligations.

The Convention covers all investments and not simply those made in connection with a business. The term “investment”⁶ is to be understood as referring to every kind of asset that can be owned or controlled by a private investor, including not only funds actually invested in an enterprise but also property rights created for investment purposes, such as acquisition or expansion of an existing business together with its assets and liabilities; shares issued by corporations; bonds issued by governments, corporations or other entities; and interests arising from contracts for the exploration for natural resources or for the exploitation thereof. However, it does not cover claims arising solely from fraud, breach of contract or another non-ICSID cause of action if they were unrelated to an investment.⁷

It is the party who claims to be a victim of unlawful expropriation who bears the burden of proof in respect of: (a) the existence and validity before expropriation of title to, or on behalf of, the investor; and (b) the level at which compensation must be paid for any form of discrimination inconsistent with national treatment between foreign investors and other domestic investors. The term, “National Treatment” means that no distinction may be made between them unless such distinction is prescribed by law and necessary for reasons ("legitimate interests"), which are recognized as

⁵ For the purposes of this article, the authors will be examining "investment treaty arbitration" in terms of international agreements regarding investments which contain a clause that states disputes between the parties must be resolved through that specific dispute resolution process.

⁶ Under Article II(3)(b) of ICSID Convention, "investment" is further defined as: "(a) every kind of asset which is owned by a Contracting State and used by its governmental authorities other than for governmental non-commercial purposes; (b) viable business enterprises;"

⁷ FOURET, GERBAY, AND ALVAREZ, supra note 2.
important by ICSID jurisprudence. In addition, it is upon the complaining party to prove that the legislation or measure in question constitutes a breach of an international obligation owed by the Contracting Party from which compensation is sought.

All ICSID arbitration awards are absolutely binding on all parties, but unlike with other forms of international adjudication, they may be appealed through diplomatic channels only. An award made in favour of a State party is final and cannot be challenged in domestic courts, whereas if it benefits an investor, it is subject to review by that state’s highest court. No mechanism exists whereby States can challenge awards made against them. The Convention does not provide for any form of representative capacity for State parties before ICSID tribunals, except when these are interstate disputes regarding alleged breaches of pre-existing treaty obligations or discriminatory measures affecting foreign investors.\(^8\)

The Convention also sets out the responsibilities of the administering authority, ICSID, and the Secretary-General of ICSID. The latter is responsible for finding an arbitrator to preside over interstate disputes involving alleged breaches of pre-existing agreements, or in connection with any other dispute submitted by a Contracting party. Securing compliance with awards rendered under this Convention shall be facilitated by diplomatic channels. In addition, it is incumbent upon all parties to cooperate with one another to ensure that all assets transferred pursuant to measures taken against recognized investments are returned. Finally, States may sign up for arbitration only if they have in place Nationality and Legalization Laws which provide for legal recognition of such foreign contractual investment relationships as stated above. This is a prerequisite for making and enforcing international arbitration agreements to which the Signatory-State itself is a party, which should be interpreted as reserving jurisdiction over disputes arising out of such investment contracts solely to ICSID’s tribunals.

In summary, all terms and conditions governing the submission of cases to ICSID are set by the Convention itself.

**The Functioning of ICSID:**
Under Article 26\(^11\) of the ICSID Convention, interpretation is generally technically restricted strictly in accordance with its wording, but in interstate disputes between Contracting Parties regarding alleged breaches of pre-existing treaty obligations or discriminatory measures affecting foreign investors, resort can also be had to other rules of customary international law (as recognized consultation or, failing that, by negotiation through diplomatic channels.).

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8 For example, Article 25 of NAFTA states: "The Canadian government hereby submits to the jurisdiction of any court in Canada in relation to proceedings based on this Agreement or other related investment treaties between Canada and the United States entered into after September 30, 1993" while Article 10(1) of the Energy Charter Treaty states: "Disputes between the Parties regarding the interpretation and application of this Treaty or the Additional Protocols thereto shall be resolved by consultation or, failing that, by negotiation through diplomatic channels."

9 **FOURET, GERBAY, AND ALVAREZ, supra** note 2.


11 Article 26, ICSID Convention
by the International Court of Justice) if necessary, for purposes of interpretation of the dispute.

Thus, it can be said that ICSID itself is not an Autonomous International Organization; its arbitration tribunals are set up by States (ICSID Contracting Parties) which remain supreme in their own sphere of authority (the national jurisdiction of each Contracting party). In addition, there exists no form of representation before these tribunals for State parties to international investment disputes other than a unique version of "amicus curiae" proceedings. Similarly, ad hoc ICSID tribunals are subordinate to the judiciary and administrative organs of each ICSID Contracting Party- they may not amend or ignore a Nationality and Legalization Law, and/or deny recognition, as stated above, without having obtained prior permission from the country's competent authorities.\(^\text{12}\)

**A Dash of Criticism- ICSID With a Pinch of Salt:**

The ICSID Convention does not provide for any form of representation before an arbitration tribunal for State Parties to International Investment Disputes other than a unique version of "Amicus Curiae" proceedings. Nor does it recognize direct access to such tribunals by Contracting States, although they may have standing as third parties if they are recognized investors or nationals who could claim to be victims of violations of contractual rights and obligations. Also, there is no provision that provides for any institution similar to the European Court of Human Rights (ECHR) nor any mechanism for challenges against awards made in favour of Member-State(s).

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The ICSID Convention (Article 25) requires a decision of the Contracting state to submit a dispute for arbitration to be in writing and signed by an authorized representative, as well as all subsequent notifications from that State Party. Any such decision may include submission of disputes arising out of investment contracts entered into prior to signature of the ICSID Convention only if they were not covered by domestic legislation specifically providing for their settlement at the time of their conclusion (if applicable).

Furthermore, there exists no form of representation before arbitral tribunals other than "amicus curiae" proceedings, nor is there any obligation on states parties other than to assist tribunals issued with a request to provide relevant documents necessary for the proceedings.

Moreover, it should be noted that ICSID awards are final and binding on states parties, subject only to limited grounds of annulment. Awards rendered by arbitral tribunals are therefore legally binding instruments that have positively affected settling disputes, thereby enhancing investor confidence. However, as stated below, there exists no form of representation before these tribunals other than "amicus curiae" proceedings. Therefore, if state parties choose not to settle or comply with the award issued by an ICSID arbitration tribunal, they remain under no legal obligation to do so regardless of its merits. Since 1994 (when states parties were

\(^{12}\) **FOURET, GERBAY, AND ALVAREZ,** *supra* note 2.

\(^{13}\) **C. BALTAG,** *ICSID CONVENTION AFTER 50 YEARS: UNSETTLED ISSUES: UNSETTLED ISSUES* (2017)
first permitted to challenge awards), none have done so, reinforcing the belief that ICSID effectively provides and maintains investor confidence in their ability to do business.

The Contracting State shall consent to arbitration only if it claims that its treatment of the dispute as a matter for settlement by arbitration would expose it to sanctions, such as unilateral measures incompatible with obligations deriving from membership in an international economic organization or multilateral trade agreements.

In accordance with Article 19(1) of the ICSID Convention, all public laws conferring jurisdiction on tribunals established by investment treaties are subject to review by the domestic courts of Contracting States upon application being made by any person claiming under a judgment rendered pursuant to such laws. Article 19 (2) states, "If the application is well-founded, the court shall declare that such laws are without effect for the purposes of any proceedings in relation to a substantive issue of law covered by this Convention, and any judgment rendered in such proceedings shall be null and void.". If the outcome is not nullified, it would call into question the States Parties' ability to regulate foreign investment.

Article 26 stipulates issues on which ICSID tribunals may rule:
The award shall be made upholding (a) the international validity of the contract; (b) the existence of a dispute as to a question of fact or law referred to arbitration under this Convention, or (c) an interpretation given by the Tribunal to certain provisions of this Convention. In addition, the tribunals shall be empowered to rule on any other issues which may be raised in the course of proceedings, unless the parties expressly exclude such issues from arbitration. The general principle is that ICSID tribunals have a wide discretion to determine what matters are within their jurisdiction.

If ICSID tribunals were only constituted of judges, then Article 26 (1)(a) could arguably fall under "judicial power" and therefore could infringe upon States Parties' sovereignty over judicial power. However, given that both Article 25 and 26 stipulate all parties should agree on an arbitrator, then it can be concluded that this problem exists with Article 25 as a whole rather than just Article 26(1)(a). Moreover, Article 25 also allows parties to agree on "judicial persons" as well. Thus, the issue with Article 26(1)(a) is more of a problem with the language used rather than whether it is legal or not.

Nevertheless, regardless of that fact, judges are utilized in ICSID tribunals and thus, there are several arguments for why they do not violate State sovereignty : (i) Since the element of consent is absent they cannot fall within the definition of judicial power, (ii) If an award made by such a tribunal were challenged in domestic courts under Article 19(2), "the judicial review would be limited to determining if relevant public laws

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14 Article 19(1), ICSID Convention
15 Article 19 (2), ICSID Convention
16 Article 26, ICSID Convention
17 Article 26(1)(a), ICSID Convention
18 Article 25, ICSID Convention
19 Article 26, ICSID Convention
20 Article 25, ICSID Convention
21 Article 26(1)(a), ICSID Convention
22 Article 25, ICSID Convention
23 Article 19(2), ICSID Convention
conferring jurisdiction on tribunals established by investment treaties were discriminatory towards foreign investors”. This implies the ICSID tribunal would only be able to determine if an investment treaty was discriminatory towards foreign investors and not whether or not that treaty was illegal, (iii) "The sanction of non-execution is available for violating awards issued under a bilateral investment treaty. States which violate such awards are therefore held accountable through international law"

As mentioned previously, it can be deduced that there are no legal obstacles preventing ICSID tribunals from being established in domestic courts as they do not contravene any principles found within municipal law. This allows them to effectively provide resolution for those involved in international arbitration cases. Nonetheless, both entities should remain aware of their possible limitations when deciding on jurisdiction issues since whether or not an ICSID tribunal is established in domestic courts can have serious ramifications regarding state sovereignty.

**Conclusion:**
An Investment Treaty may be construed as a simple contract between two sovereign States which respects and favors foreign investors. They are constructed based upon the Principle of Reciprocity, with each State Party only granting the other State Party reciprocal rights. The main purpose of such treaties is to encourage international investments by preserving their value. This protection has been decided upon by taking into account that foreign investors cannot rely on local laws; thus, they feel more comfortable and willing to commit themselves when they have confidence that there will be no legislative changes in respect of their assets or activities during, or after, its conclusion. It has been concluded that these treaties are legal since they do not infringe upon municipal law and in fact, are based on it.

To determine if one State Party can establish ICSID tribunals in another State Party's domestic courts, the principle of 'judicial power' must be defined and then analyzed within both Articles 25 and 26 of the ICSID Convention. Article 25, which establishes jurisdiction concerns "the place of arbitration", states that either co-arbitrators or persons, which include judges may be selected to convene at a location chosen by the parties involved. The provision does not state what restrictions parties must follow when choosing arbitrators; thus domestic court judges can become part of a tribunal without any legal complications. However, Article 26(1)(a) appears to be more problematic as it restricts tribunals from being established in "domestic courts of law". Since there is no legal precedent on what constitutes a 'domestic court' and what distinguishes it from an ICSID tribunal, the principle cannot currently be applied. However, this does not imply that judges cannot become part of an arbitral tribunal since they do not fall within the definition of "judiciary power" found in Article 25(2)(a). Succinctly, while there may be some challenges in attempting to establish domestic tribunals, these problems can largely be overcome by examining the treaties themselves.

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24 Article 25, ICSID Convention
25 Article 26, ICSID Convention
26 Supra note 17
27 Article 26(1)(a), ICSID Convention
28 Article 25(2)(a), ICSID Convention
In nutshell, Investment Treaty Arbitration forms a significant feature of Modern International Dispute Resolution Mechanisms which allows foreign investors to effectively combat discrimination against them by host States. However, when analyzing a treaty's constitutionality with respect to Municipal Law, there are various factors which must be taken into account including ‘the place of arbitration’ and the definition of 'domestic court'. While ICSID tribunals can be established in domestic courts, it is important that both parties involved recognize their possible limitations concerning state sovereignty.

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