AN INTRODUCTION TO ICSID

“KIEV ARBITRATION DAYS 2011: THINK BIG!”
November 17, 2011
PART I:

ICSID AS AN INTERNATIONAL ORGANIZATION
Established in 1965 by the International Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention or the Washington Convention)

One of the 5 institutions of the World Bank Group
PURPOSE OF ICSID

➢ To offer a neutral facility to resolve investment disputes between foreign investors and host States

➢ In turn, this enhances investor confidence and contributes to increased cross-border investment flows
MEMBERSHIP –
147 CONTRACTING STATES & 157 SIGNATORIES
# ICSID Governance Structure

## Administrative Council
- One vote per State
- Chair: President of the World Bank (no vote)

### Functions
- Governance role – e.g.: adopt ICSID rules, budget, etc.
- No role in cases

## Secretariat
- Secretary-General & 40 staff
- “day-to-day” operations

### Functions
- Support hearing process
- Training and publications
ICSID’s ROLE

- ICSID provides facilities for conciliation and arbitration of international investment disputes
- ICSID supports the parties and the arbitrators at the direction of the President of the Tribunal or ad hoc Committee
- ICSID does not make the decisions
PART II:

ARBITRATION AT ICSID
STEPS IN AN ICSID CASE

Request for Arbitration → Refusal to Register
Registration →
Constitution of the Tribunal →
First Session →
Written Procedure →
Oral Procedure →
Deliberations →
Award →
Supplementary Decision and Rectification →
Post-Award Remedies: Annulment, Interpretation, Revision
CONDITIONS FOR ICSID JURISDICTION -
ARTICLE 25(1) OF THE ICSID CONVENTION

- Legal Dispute
- Arising Directly out of an Investment
- Between Contracting State
- And National of another Contracting State
- Consent in Writing
CONSENT IS THE CORNERSTONE OF JURISDICTION

Sources of Consent:

- Contracts
- Investment Laws
- Bilateral Investment Treaties
- Multilateral Agreements
HOW DOES AN ICSID CLAUSE IN A TREATY BECOME “CONSENT” TO ICSID ARBITRATION?

- State gives consent by concluding the Treaty
- The ICSID clause is seen as an “offer”
- The covered investor may “accept” the offer, often by submitting the dispute to ICSID
- The consent in writing is perfected by the covered investor’s acceptance
WHAT IS AN “INVESTMENT”?

- Significant undertaking
- Duration
- Risk
- Regularity of profits
- Contribution to the host State’s Economy

I will apply the parties’ definition
### EXAMPLE OF ICSID JURISDICTION

*Tokios Tokelės v. Ukraine* (ICSID Case No. ARB/02/18)

<table>
<thead>
<tr>
<th>Legal Dispute</th>
<th>The dispute concerned an alleged political repression campaign by Ukrainian authorities claimed to have breached the investment protection provisions of the BIT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Investment</td>
<td>The investment was the Claimant’s subsidiary in Ukraine</td>
</tr>
<tr>
<td>Contracting State</td>
<td>The Respondent was Ukrainian Claimant was a Lithuanian publishing company</td>
</tr>
<tr>
<td>Consent</td>
<td>Consent to ICSID arbitration was contained in the Lithuania/Ukraine BIT</td>
</tr>
</tbody>
</table>
A claimant may bring a claim for violation by a State of any of the substantive protections provided for in an investment treaty, law, or contract.

Typical protections include:
- Fair and equitable treatment
- Full protection and security
- No expropriation
- National treatment
- Most favored nation treatment

The usual remedy requested by a claimant is compensation for breach of the relevant protection.
REVIEW OF THE REQUEST

ICSID counsel screen and recommend registration of, or refusal to register, the request according to Article 36(3) of the ICSID Convention:

Is the dispute “manifestly outside” the jurisdiction of the Centre?
HOW ARE ARBITRATORS SELECTED?

ICSID Panel  Outside Panel
WHAT QUALITIES ARE NEEDED?

- High moral character
- Recognized competence in the fields of law, commerce, industry or finance
- May be relied upon to exercise independent judgment
- Not previously an arbitrator or conciliator in the dispute
NATIONALITY OF ARBITRATORS – ARTICLE 39 OF THE ICSID CONVENTION

The majority of the arbitrators shall be nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute

• Exception: if the sole arbitrator or each individual member of the Tribunal has been appointed by agreement of the parties
METHOD OF CONSTITUTION OF A TRIBUNAL

The parties agree on a method

The parties do not agree on a method
ARTICLE 37(2)(B) OF THE ICSID CONVENTION – DEFAULT MECHANISM

➢ When no agreement, have three arbitrators:
  • one arbitrator appointed by each party
  • third (president) appointed by agreement of the parties
NO AGREEMENT OF THE PARTIES – TIMELINE

Article 38 of the ICSID Convention and Arbitration Rule 4(1)

If the Tribunal is not constituted within 90 days after registration of the request, either party can ask the Chairman to appoint the arbitrator(s) not yet appointed.
CONSTITUTION OF TRIBUNAL TRIGGERS:

- 60 day limit for holding the First Session

- 30 day limit for Preliminary Objection that there is a “manifest lack of legal merit” under Rule 41(5)

- First advance payment
WRITTEN PROCEEDINGS

- Normally two rounds of pleadings:
  - Claimant’s Memorial
  - Respondent’s Counter-memorial
  - Claimant’s Reply
  - Respondent’s Rejoinder

- Same structure for jurisdictional, merits and quantum phases
WRITTEN PROCEEDINGS

➢ Production of documents

The Tribunal may, if it deems it necessary at any stage of the proceedings... call upon the parties to produce documents or other evidence...
Hearings

- Opening and closing arguments
- Examination of witnesses and experts
  - By the parties, before the Tribunal, under control of the President
    - Direct examination (exceptional)
    - Cross-examination
    - Re-direct examination
- Held in two or more of the Centre’s official languages
  - Simultaneous v. Sequential translation
PROVISIONAL MEASURES

➢ May request interim relief preserve the party’s rights:
  • Preliminary injunctions
  • Orders preserving property or evidence
  • Orders requiring parties to post security

➢ Important to protect rights while the arbitral proceedings are pending
PREPARATION OF THE AWARD – ARBITRATION RULE 46

- Issued
  - Within 120 days after closure of the proceeding
  - Possible 60-day extension

- In writing

- Signed by the members of the Tribunal who voted for it
Cost of arbitration includes:

- Parties’ expenses
- Arbitrator’s fees and expenses
- Centre’s administrative fees
ARBITRATION PROCEEDINGS CONCLUDED IN FY 2011

Dispute decided by Tribunal 62%

Dispute settled or proceeding otherwise discontinued 38%
AWARDS IN CONCLUDED ARBITRATIONS – FY 2011

- Award declining jurisdiction: 19%
- Award deciding that the claims are manifestly without legal merit: 12%
- Award dismissing all claims: 25%
- Award upholding claims in part or in full: 44%
ICSID PROCEEDINGS MAY BE TERMINATED

- By a final decision of the competent body on the merits of the dispute (award)
- By a decision declining jurisdiction

But also by:

- Withdrawal of the request for institution of proceedings – before registration
- Discontinuance - after the request has been registered and before a final decision
WHY DISCONTINUE AND ON WHAT GROUNDS?

➢ Practical reasons for discontinuance (business and/or legal considerations; recourse to non-judicial resolution; funding issues, etc.)

➢ Grounds provided for in the Rules and Regulations (not in the ICSID Convention):
  • Arbitration Rule 43 - upon settlement
  • Arbitration Rule 44 - on the request of a party
  • Arbitration Rule 45 - for failure of the parties to act
  • Regulation 14(3)(d) and (e) – for failure of the parties to pay required advances
PART III:

POST-AWARD REMEDIES
ICSID CONVENTION IS SELF-CONTAINED – PREVENTS DOMESTIC COURT REVIEW OF DECISIONS

- Rectification
- Interpretation
- Revision
- Annulment
RECTIFICATION OF AWARDS –
ARTICLE 49(2) OF THE ICSID CONVENTION

➢ To rectify clerical or arithmetic error

➢ Request no later than 45 days after rendering the award on decision
INTERPRETATION –
ARTICLE 50 OF THE ICSID CONVENTION

- When there is a dispute between the parties as to the meaning or scope of the award

- Dispute re-transmitted to the same Tribunal

- Stay of enforcement may be granted
REVISION –
ARTICLE 51 OF THE ICSID CONVENTION

➢ On discovery of a fact “as decisively to affect the award” if it was unknown to the Tribunal and the applicant (who was not negligent)
➢ Dispute re-submitted to the same Tribunal
➢ Stay of enforcement is granted:
  • Automatically by the ICSID Secretary General if requested in the application
  • If not, the Tribunal decides
ANNULMENT - ARTICLE 52 OF THE ICSID CONVENTION NOT AN APPEAL

- No Appeal under the ICSID Convention (Art. 53)

- Annulment vs. Appeal
  - Closed list of grounds vs. errors of law or fact
  - Invalidation vs. modification of original award
ANNULMENT - GROUNDS

- The Tribunal was not properly constituted
- The Tribunal has manifestly exceeded its powers
- Corruption on the part of a Tribunal member
- A serious departure from a fundamental rule of procedure
- The award failed to state the reasons on which it is based
EFFECTIVE OCTOBER 31, 2011:

- 3% of all registered have ultimately resulted in annulment (in full or in part)

- 8% of all awards rendered have been annulled (in full or in part)
RECOGNITION OF AWARDS –
ARTICLE 53 OF THE ICSID CONVENTION

- ICSID awards are binding and parties must comply with them
- A party seeking recognition or enforcement provides certified copy of award to competent court
- NO substantive review by national courts
- Pecuniary obligations in awards shall be treated as final judgments of the national courts of the Contracting States
COMPLIANCE WITH ICSID AWARDS

➢ Non-compliance:

• Is a breach of the ICSID Convention and could give rise to a State-to-State dispute for treaty violation before the ICJ

• Defeats objective of attracting foreign investment by maintaining investor confidence

• Could be a factor taken into account by providers of political risk insurance