



APEC-UNCTAD REGIONAL TRAINING COURSE ON THE CORE ELEMENTS OF INTERNATIONAL INVESTMENT AGREEMENTS IN THE APEC REGION

Presentations

Kuala Lumpur, Malaysia
15-19 June 2009

Produced for:
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APEC#209-CT-01.5



APEC-UNCTAD Regional Training
Course on the Core Elements of
International Investment Agreements in
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International Centre for Settlement of Investment Disputes (ICSID)

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Introduction to ICSID

What is ICSID?

- One of the 5 organizations of the World Bank Group
 - ICSID (*established in 1966*)
- ICSID has 143 Contracting States

What is ICSID mission?

- ICSID provides facilities for conciliation and arbitration of investment disputes between a State and a national of another State
- ICSID works to promote international investment for development by providing investors and States with an independent forum for dispute settlement

What Is the Structure of ICSID?

- **Administrative Council**
 - One representative from each Contracting State
 - Chairman: *ex officio* President of the World Bank
 - Elects Secretary General and Deputy Secretary General
 - Adopts:
 - ICSID Regulations and Rules
 - ICSID annual budget
- **Secretariat**
 - Secretary-General (Meg Kinnear)
 - Chief Counsel
 - Approx. 10 Counsels
 - Responsible for administering the Centre
 - Responsible for maintaining the Panel of Conciliators and Arbitrators

Jurisdiction of the Centre

ICSID Jurisdiction

Consent: Main Condition for ICSID Arbitration or Conciliation

- Sources of Consent to ICSID Arbitration or Conciliation:
 - Contracts
 - Investment Laws
 - Bilateral Investment Treaties
 - Multilateral Agreements (NAFTA, ECT, CAFTA)

Article 25 of the Convention:

“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**. When the parties have given their consent, no party may withdraw its consent unilaterally.”

Article 25 of the Convention *(cont.)*

1. Written Consent
2. *Ratione Personae*
3. *Ratione Materiae*

Articles 25(1) and (3) of the Convention: *ratione personae* jurisdiction

“(…) a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) (…)”

“Consent by a constituent subdivision or agency of a Contracting State shall require the approval of that State unless that State notifies the Centre that no such approval is required.”

Article 25(2)(a) of the Convention: *ratione personae* jurisdiction

“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.**”

Soufraki v. United Arab Emirates (ICSID Case No. ARB/02/07)

“Where, as in the instant case, the jurisdiction of an international tribunal turns on an issue of nationality, the international tribunal is empowered, indeed bound, to decide that issue.”

“(…) had Mr. Soufraki contracted with the United Arab Emirates through a corporate vehicle incorporated in Italy, rather than contracting in his personal capacity, no problem of jurisdiction would now arise. (…) Since, as found by the Tribunal, Claimant was not an Italian national under the laws of Italy at the two relevant times, this Tribunal does not have jurisdiction to hear this dispute.”

Champion Trading et al. v. Egypt
(ICSID Case No. ARB/02/9)

“What is relevant for this Tribunal is that the three individual Claimants, in the documents setting up the vehicle of their investment, used their Egyptian nationality without any mention of their US nationality. (...) The mere fact that this investment in Egypt by the three individual Claimants was done by using, for whatever reason and purpose, exclusively their Egyptian nationality **clearly qualifies them as dual nationals within the meaning of the Convention and thereby based on Article 25 (2)(a) excludes them from invoking the Convention.** The Tribunal therefore holds that it does not have jurisdiction over the claims of the three individual Claimants.”

Article 25(2)(b) of the Convention:
ratione personae jurisdiction

“(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.”

Champion Trading et al. v. Egypt
(ICSID Case No. ARB/02/9)

“Neither the Treaty nor the Convention contain any exclusion of dual nationals as shareholders of companies of the other Contracting State, contrary to the specific exclusion of Article 25 (2)(a) of the Convention regarding natural persons.

The Respondents did not adduce any precedents or learned writings according to which dual nationals could not be shareholders in companies bringing an ICSID action under the Treaty.

The Tribunal therefore holds that **it does have jurisdiction over the claims of the two corporate Claimants.**”

Article 25(1) of the Convention:
ratione materiae jurisdiction

“(...) any legal dispute arising directly out of an investment (...)”

- Conflicts of rights, NOT conflicts of interests
- No definition of the term “investment”

(Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States)

Joy Mining Machinery Ltd. v. Egypt
(ICSID Case No. ARB/03/11)

“The fact that the Convention has not defined the term investment does not mean, however, that anything consented to by the parties might qualify as an investment under the Convention. The Convention itself, in resorting to the concept of investment in connection with jurisdiction, establishes a framework to this effect: jurisdiction cannot be based on something different or entirely unrelated. In other words, it means that there is a limit to the freedom with which the parties may define an investment if they wish to engage the jurisdiction of ICSID tribunals.”

How Has the Conduct of Proceedings Changed?

- Innovative provisions in NAFTA
 - Other two NAFTA Parties participate on questions interpretation of the treaty
- No confidentiality in proceedings
 - Some NAFTA hearings open to the public: *UPS v. Canada* and *Methanex v. United States of America*
- Third Party participation (*Methanex v. USA*)
- Provisions allowing for consolidation of proceedings

A further change:

More than half of ICSID's proceedings are conducted in two languages

Initiation and Conduct of an Arbitration Proceeding

Initiation and Conduct of ICSID Proceedings

- Contents of a Request for Arbitration
- Screening and Registration of a Request
- Constitution of an Arbitral Tribunal and the Role of the ICSID Secretariat
- Procedural Framework of the Proceeding
- The Role of the Secretary of the Tribunal

Contents of a Request for Arbitration

Requirements set forth in:

- Rule 2 of the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (“Institution Rules”)

Screening & Registration of a Request for Arbitration

Requirements set forth in:

- Convention Article 25
- Convention Article 36

Article 36(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.**”

ICSID Arbitral Tribunals

- Usually three members
- Each party appoints one member
- The third, who serves as President of the Tribunal, appointed by agreement of the parties
- If a party refuses to appoint an arbitrator or if there is no agreement on the President, the Centre can appoint the missing arbitrator on request of either party

Procedural Framework of the Proceeding

First Session of the Tribunal

- Preliminary and organizational matters (*e.g.*, place of proceeding, language(s), dates for written pleadings, production of evidence)
- If no agreement, the Arbitral Tribunal decides

Hearings

- Jurisdiction and the merits
- Held in Washington, D.C., unless otherwise agreed
- Oral pleadings; examination and cross examination of witnesses and experts, questions of the Tribunal

The Secretary of the Tribunal

- Assists the Arbitrators
- Is the channel of communications between the parties and the Tribunal
- Drafts procedural orders
- Organizes hearings
- Administers the finances of the case

The Award

- Tribunal renders Award after it has heard the case
- Post award remedies available:
 - Rectification – Convention Article 49(2)
 - Interpretation – Convention Article 50
 - Revision – Convention Article 51
 - Annulment – Convention Article 52

The Award *(cont.)*

Annulment possible on the following grounds:

1. Tribunal not properly constituted
2. Tribunal manifestly exceeded its powers
3. Corruption on part of a Tribunal member
4. Serious departure from fundamental rule of procedure
5. Award failed to state reasons on which it is based

Amendments to the ICSID Arbitration Rules:

- Rendering of the Award
- Oral procedure (open hearings)
- Submissions of non-disputing parties

Amendments *(cont.)*

- ICSID to publish excerpts of the legal conclusions applied by tribunals

Amendments *(cont.)*

- Unless either party objects, tribunals may allow other persons, besides the parties, to attend or observe all or part of the oral hearings

Amendments *(cont.)*

- Under certain conditions, tribunals may allow a person or a State that is not a party to the dispute to file a written submission with the tribunal