

The Role of ICSID in International Economic Law

Meg Kinnear*

ABSTRACT

The International Centre for Settlement of Investment Disputes was established in 1966 as a facility for the resolution of international investment disputes. Today, it has 158 member states and has administered roughly 70% of all known investor-state cases. International Centre for Settlement of Investment Disputes has taken a leadership role in modernizing the procedures for investor-state dispute resolution, especially in the 2006 and 2022 amendments to those rules.

I. ESTABLISHMENT OF ICSID

Many of the most enduring international economic law institutions were established in the post–World War II era, recognizing the nexus among resolution of international economic disputes and global peace, security, and development. ICSID, the International Centre for Settlement of Investment Disputes, was one such institution.

ICSID was inspired by a number of earlier initiatives to codify international investment obligations and provide a forum for their resolution. Notably, the 1959 Abs-Shawcross Draft Convention,¹ a 1960 Report by the Secretary-General of the United Nations recommending an international institution to arbitrate investor-state disputes,² and the 1962 Organization for Economic Cooperation and Development Draft Convention on Investments Abroad³ paved the way for establishing ICSID. ICSID was also inspired by events closer to home, in particular, the growing resort of states and international investors to the President of the World Bank, invoking his good offices to resolve some of the most complex international investment disputes of the time.⁴

In 1961, Aron Broches, the then World Bank General Counsel, began consultations with the Executive Directors of the Bank on a facility for international investment dispute resolution. In 1965, the ICSID Convention was opened for signature, and it came into effect in October 1966,

* Secretary-General of ICSID & Vice-President, World Bank Group. E-mail: mkinnear@worldbank.org.

¹ 'Draft ("Abs-Shawcross Draft Convention") Convention on Investments Abroad', 9 *Journal of Public Law* 115 (1960).

² *The Promotion of the International Flow of Private Capital: Progress Report*, Secretary-General, United Nations Economic and Social Council, E/3325 (26 February 1960).

³ 'Draft Convention on the Protection of Foreign Property', Organization for Economic Cooperation and Development, 2 *International Legal materials* 241 (1963). See also Antonio R. Parra, *The History of ICSID*, 2nd ed. (Oxford University Press, 2017), 11–24.

⁴ See Parra, above n 3, at 19–23.

with the first 20 state ratifications.⁵ As of November 2022, ICSID had grown to 158 ratified members.⁶

The ICSID Convention established the ICSID (the Centre).⁷ 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.⁸ The Centre was to administer 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 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.’⁹

A set of provisional rules and regulations were drafted by February 1967. These were adopted with slight changes at the Annual Meeting of September 1967 and took effect on 1 January 1968.¹⁰ In September 1978, the Administrative Council approved the creation of an additional set of rules called the ICSID Additional Facility (AF). The AF offered arbitration, conciliation, and fact-finding in cases where either (but not both) the state party or the home state of the foreign investor was an ICSID contracting state. The AF procedural rules were similar to those under the Convention, but AF proceedings were not eligible for the protections of the Convention, notably the right to request annulment under Article 52 and the simplified enforcement regime under Articles 53–55 of the ICSID Convention.

The initial 30 years at the Centre was relatively quiet. The first ICSID case was initiated in 1972, based on a contract between Holiday Inns and Morocco to build and operate hotels.¹¹ By 1999, ICSID had administered only 69 ISDS cases, an average of two cases per year. Only three of those cases were conciliations, a trend that has continued to the present day. Most of the early cases were based on consent in investment contracts.¹² Indeed, the first case based on consent in an investment treaty was initiated in 1987 in *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*.¹³

The pace accelerated after 1999. Between 1 January 2000 and 30 June 2022, ICSID administered a further 819 cases. As of 30 June 2022, ICSID had registered a total of 888 cases under the ICSID Convention and AF, firmly establishing it as the main facility in this field.¹⁴ Overall, ICSID has administered roughly 70% of all known investment disputes under the ICSID Convention, ICSID AF, UNCITRAL Rules, and *ad hoc* proceedings.

Roughly, 75% of all ICSID cases have been based on consent in a bilateral or multilateral investment treaty.¹⁵ This reflects a policy development globally that is sometimes referred to as the ‘treatification’ of international investment law.¹⁶ As of 19 August 2022, there were 3301 known international investment agreements, of which 2566 are currently in force. More than 200 states currently have investment agreements, meaning that close to all states have signed one or more such agreements. The vast majority of these were concluded after 1992, and most

⁵ *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (14 October 1966) 575 UNTS (ICSID Convention). For a full negotiating history, see *History of the ICSID Convention*, <https://icsid.worldbank.org/resources/publications/the-history-of-the-icsid-convention> (visited 22 November 2022).

⁶ *Database of ICSID Member States*, <https://icsid.worldbank.org/about/member-states/database-of-member-states> (visited 22 November 2022).

⁷ See ICSID Convention, Art. 1, above n 5.

⁸ 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).

⁹ See ICSID Convention, Art. 25—Jurisdiction of the Centre, above n 5.

¹⁰ See Parra, above n 3, at 87–106.

¹¹ *Holiday Inns S.A. and others v. Morocco*, ARB/98/1, 1 ICSID Rep. 645 (1993).

¹² *The ICSID Caseload Statistics*, Issue No. 2022–2, <https://icsid.worldbank.org/resources/publications/icsid-caseload-statistics> (visited 22 November 2022) (ICSID Caseload Report).

¹³ *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ARB/87/3.

¹⁴ See *ICSID Caseload Report*, above n 12.

¹⁵ *Ibid.*

¹⁶ See, for example, Jeswald W. Salacuse, ‘The Treatification of International Investment Law’, 13 *Law and Business Review of the Americas* 155–166 (2007).

include advance consent to arbitrate or conciliate disputes at ICSID.¹⁷ ICSID's growing caseload also reflects the extraordinary net increase in global foreign direct investment (FDI) in the last 30 years, from 204,888 million in 1990 to 1,582,310 million in 2021.¹⁸ Obviously, with the increase in cross-border investment, the potential for disputes and the need for ICSID as a facility in which to resolve them grow exponentially.

II. THE CONTRIBUTIONS OF ICSID

The success of ICSID is attributable to various factors. Most importantly, it meets a very real need for both investors and states. Prior to ICSID, foreign investors often had limited or no recourse against sovereign states, resulting in increased transaction costs or the loss of much-needed investment altogether.¹⁹

The availability of ICSID ensures an effective and impartial venue for foreign investors to adjudicate their disputes against a sovereign state and, if successful, to obtain a final and binding award. The design of the Convention is tailored to the unique aspects of the discipline. For example, the decision to limit ICSID's role to procedural options, and not to attempt to codify the substantive obligations of international investment law, has proved especially sage given the clear desire of states to negotiate their investment obligations on an individualized basis. The decision to offer a limited post-award remedy in the form of annulment, coupled with the simplified recognition and enforcement mechanism in section 6 of the Convention, has also proved to be invaluable and is not replicated in the rules of any other institution.

As an institution, ICSID has proved itself a leader in strengthening and modernizing the discipline of investment arbitration—especially in the last 25 years. This has been notable in the degree of transparency of ICSID proceedings. Every case is tracked on ICSID's website, and newly released decisions are published daily. ICSID publishes detailed statistics every six months, collating data on the number of cases, the basis of consent, the success rate of parties, the economic sectors involved, the nationality and gender of arbitrators, and other data of interest to the public at large. The importance of transparency in ISDS cannot be underestimated: it allows for more consistent development of the applicable law and enhances confidence in the system at large.

With the increase in cases, ICSID tribunals and *ad hoc* committees have been largely responsible for creating a body of substantive and procedural international investment law. For example, ICSID tribunals have established a rich jurisprudence on the meaning of 'investment' for the purposes of arbitration proceedings and on the availability and application of procedural options such as provisional measures, stay of proceedings, and bifurcation of proceedings, to name a few. Equally importantly, the jurisprudence of ICSID tribunals has elaborated on the substantive obligations in individual laws and treaties, in particular, with respect to the meaning of fair and equitable treatment, expropriation, national treatment, and most-favored nation treatment.

ICSID's leadership in the field has been especially evident in the continued modernization of its procedural rules, most notably, the amendments introduced in 2006 and 2022. 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

¹⁷ UNCTAD, 'International Investment Agreements Navigator', <https://investmentpolicy.unctad.org/international-investment-agreements> (visited 22 November 2022).

¹⁸ UNCTAD, 'World Investment Report 2022', <https://unctad.org/data-visualization/global-foreign-direct-investment-flows-over-last-30-years> (visited 22 November 2022).

¹⁹ See Salacuse, above n 16 at 158–162. See also Meg Kinnear, 'The Growth, Challenges and Future Prospects for Investment Dispute Settlement', 423 *Collected Courses of the Hague Academy of International Law* 21–23 (2022).

legal issue.²⁰ 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.²¹

In March 2022, ICSID member states approved an even more comprehensive set of amendments. The main objectives of the 2022 amendments were to further transparency, reduce the cost and time of proceedings, give parties a greater variety of dispute settlement tools, and address many of the recent debates on investment dispute settlement.

The 2022 rules enhance transparency, in particular, by requiring publication of all orders and decisions,²² allowing publication of party-filed submissions,²³ permitting non-disputing treaty party participation,²⁴ and defining confidential and protected information.²⁵

These amendments will reduce the time and cost of cases through various techniques, including shorter deadlines,²⁶ requirements to issue an order or award within a finite time,²⁷ the ability to consolidate or coordinate like cases,²⁸ an emphasis on case management by the tribunal or Committee,²⁹ remote filing of documents,³⁰ and the option to consent to an expedited arbitration procedure.³¹

As part of its modernization, the ICSID 2022 amendments diversify the types of dispute settlement mechanisms available to parties. For example, the conciliation rules were revised to make them a more modern alternate dispute resolution process. Likewise, a stand-alone set of investment mediation rules have been included for the first time, incorporating best practice in mediation. The mediation rules may be used as a standalone procedure or in combination with arbitration, conciliation, or fact-finding proceedings. The fact-finding rules have also been completely revised and remain available at any point where an independent assessment of facts may be useful in resolving an investment-related grievance. The jurisdiction of the AF Rules has been significantly revised to be more widely available, including where a regional economic integration organization is a disputing party and where neither the disputing state nor the foreign investor are affiliated with an ICSID member state.³²

Several of the amended rules address recent discussion about investment dispute settlement more broadly. A good example of this is provisions requiring disclosure of third-party funding to avoid inadvertent conflicts of interest between the funder and a tribunal member.³³ Other provisions update the rules on costs, in particular, by establishing enumerated criteria that must be considered when awarding costs³⁴ and by setting out a rule on security for costs that balance the needs of both parties.³⁵

III. CURRENT AND FUTURE WORK

ICSID's continuing priority is administration of cases in an efficient, expert, and expeditious manner. In particular, ICSID will be focused in the next years on ensuring that the amended rules

²⁰ 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).

²¹ *Ibid.*, at Rule 41 (5).

²² ICSID Rules 2022, Arbitration Rules, Rules 62–63, <https://icsid.worldbank.org/resources/publications/rules-and-regulations> (visited 22 November 2022).

²³ *Ibid.*, at Rule 64.

²⁴ *Ibid.*, at Rule 68.

²⁵ *Ibid.*, at Rule 66.

²⁶ *Ibid.*, at Rule 22, for example, concerning initiating a challenge to an arbitrator.

²⁷ *Ibid.*, at Rules 41, 44, 45, 58.

²⁸ *Ibid.*, at Rule 46.

²⁹ *Ibid.*, at Rule 31.

³⁰ *Ibid.*, at Rule 4.

³¹ *Ibid.*, Rules 75–86.

³² ICSID Additional Facility Rules, <https://icsid.worldbank.org/resources/publications/rules-and-regulations> (visited 22 November 2022).

³³ *Ibid.*, at Rule 14.

³⁴ *Ibid.*, at Rules 50–52.

³⁵ *Ibid.*, at Rule 53.

are implemented effectively and serve all parties well. This will include a great deal of training for counsel and officials, especially with new procedures such as mediation.

At the same time, ICSID continues other important projects, including efforts to increase the diversity of arbitrators. ICSID is also working on a draft Code of Conduct for Adjudicators, in conjunction with the UNCITRAL Secretariat. This work began in 2020, and the fourth draft of the Code was released in July 2022.³⁶ The Code addresses the fundamental obligations of impartiality and independence, the ability of adjudicators to play multiple roles simultaneously, disclosure of potential conflicts, and enforcement mechanisms for Code obligations.

Finally, it should be noted that ICSID has also served as an important source of technical assistance in international investment law, and this remains an ongoing priority. The Centre provides numerous presentations to states and the private sector about the applicable procedure and how to manage an ICSID case. It has also contributed to developing expertise through its various publications, including the *ICSID Review—Foreign Investment Law Journal*, as well as various practice guidelines.³⁷

All of this work takes place against a backdrop of numerous and overlapping global challenges—from climate changes to food and energy shortages—for which foreign investment is an essential part of the response. ICSID's success over the last 25 years in helping to foster the conditions for expanded FDI points toward its relevance going forward. With its strong institutional foundation—and ongoing modernizations—the Centre is well placed to meet those demands and continue making a substantial contribution to international economic law.

³⁶ *Draft Code of Conduct and Related Materials*, <https://icsid.worldbank.org/resources/code-of-conduct> (visited 22 November 2022).

³⁷ See examples at <https://icsid.worldbank.org/resources> (visited 22 November 2022).