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INTERNATIONAL INVESTMENT DISPUTES: MECHANISM FOR RESOLUTION *

ABSTRACT

An investment basically refers to allocation of money or any other resources in expectation of return in future. On a large scale, companies and big corporates invest large sum of monies in large projects with expectation of future profits.
With the rise of globalisation, many large foreign companies and business houses from a country have entered other countries with an intention to do business, thereby increasing cross-border trade. This led to a rise in international investment, i.e. cross-border investments around the world. Ideas of sustainable development and world-wide growth as an add-on with international investment started to perpetuate. This lead to a rise in cross-border investments disputes as well. Disputes arise between states when member government believes that other member government is violating the treaty between them. Therefore, a need for a 'neutral' mechanism for dispute resolution arose so that disputes can be tackled with speed and the economic development doesn't suffer. With respect to this International Centre for Settlement of Investment Disputes was established in the year 1965 and the Convention on the same was ratified by 153 States initially. The article will further deal with the establishment and objectives of ICSID and powers, procedure and challenges faced by this International Organization and author's suggestions and opinions. The article also intends to throw light on the point that India is not the party to this particular Convention and the reasons for the same will be analysed.

1. INTRODUCTION

Let Justice be for All, In All and Everywhere
- Pierre Corneille

1.1 *Investment Disputes and ICSID*

'Dispute' basically refers to disagreement over a matter, involving conflicting claims and assertions. Disputes arise between States when member government believes that another member government is violating an agreement or a commitment that it has made. Disputes between States belonging to the realm of Public International Law can very well be settled by ADR (Alternate Dispute Resolution). International Arbitration can be divided into classic State-State arbitration and State-Private party arbitration.

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- State-State Arbitration: practiced by WTO panels and the Appellate Body. A recent example of the institutionalization of state-state arbitration can be seen in the Ethiopian-Eritrean Boundary Commission and a Claims Commission, both created in 2000.[1]
- Mixed Arbitration: concerns disputes between states and private parties, mostly in commercial matters. E.g.: With respect to investment dispute International Centre for Settlement of Investment Disputes (ICSID) has been set up.[2]

Therefore, when we analyze International Centre for Arbitration, **"International Centre for Settlement of Investment Disputes" (ICSID)** is one such centre which exits for settlement of investment disputes. ICSID is an intergovernmental institution established by a treaty.[3] Wherever there is a commercial transaction between the states or an individual investor and a state and if a dispute arises then it is likely to be referred either to the courts of the State concerned or to international commercial arbitration. Although, a party to such a contract prefers arbitration as it is a 'neutral' process. ICSID is not an international court or tribunal but merely provides an institutional framework to facilitate conciliation and arbitration. The actual settlement of disputes takes place through arbitral tribunals that are constituted on *ad hoc* basis for each dispute.

1.2 *Objectives of ICSID*

Paramount objective of ICSID is to build confidence between the states by providing a neutral forum if any investment dispute arises; this in turn would lead to increase in investments which further would promote economic development. ICSID Arbitration intends to maintain a balance between the interest of investors and the Contracting States.

2. ICSID- DEVELOPMENT, SCOPE, FUNCTIONING AND POWERS

ICSID is a first such international centre in itself. ICSID was basically created through the Convention on the Settlement of Investment Disputes between States and Nationals of other States. It has been drafted in the framework of the International Bank for Reconstruction and Development (IBRD). The Convention's text was adopted by the IBRD's Executive Directors in 1965. It came into force on October 1966. The Convention is commonly referred to as the ICSID Convention.[4] As on March, 2016 there are total of 160 members who have signed and ratified the Convention.[5]

ICSID has jurisdiction over disputes arising from investments between a Contracting State and a national of another Contracting State. ICSID provides facilities for conciliation and arbitration of international investment disputes between member countries and individual investors. Now investors can rely on international mode rather than their own domestic modes. They now have a direct recourse against the foreign State in their own name and on their own behalf & this is a significant development. Thus, it has wide scope and entertains not only interstate disputes but also commercial disputes between private parties of two different States.

[1] Bilateral agreement of 12 December 2000, 40 ILM (2001), at 259. Both bodies are seated in The Hague.
[2] ICSID Convention, 14th Oct, 1965, 575 UNTS 159; 4 ILM 524 (1965)
[3] CHRISTOPH SCHREUER, *International Centre for Settlement of Investment Disputes (ICSID),* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1551962 (Checked on 1st Nov, 2016)
[4] ICSID Convention, *Supra* Note 2

[5] *Statistics on Membership*, World Bank, https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/Database-of-Member States.aspx?tab=FtoJ&rdo=BOTH (Last Checked on 5th Nov, 2016).

If ICSID has to operate like all other arbitral tribunals; then it must guarantee a number of principles that constitute the procedural **"Magna Carta"** of arbitration.[6] Magna Carta has two main principles:

- Due process[7] and fair hearing and;
- Independence and impartiality of arbitrators

When proceedings take place taking into consideration the above two conditions, then it can be said that proceedings are carried out in just and fair manner. Also, the award of the ICSID Tribunal is final and has binding effect as the judgment of National Court and the parties are under an obligation to enforce it.[8]

2.1 *Structure*

ICSID basically consists of Administrative Council and a Secretariat which maintains a Panel of Arbitrators and Conciliators. The Administrative Council is composed of one representative from each State party to the ICSID Convention. The President of the World Bank is *ex officio* Chairman of ICSID's Administrative Council.[9]

The Secretariat consists of a Secretary-General and a Deputy Secretary-General as well as legal and non-legal staff. The Secretary-General and Deputy Secretary-General are elected by the Administrative Council.[10] Until the year 2008, the General Counsel of the World Bank was elected as Secretary-General of ICSID but the two positions have since then been separated.

The Panels of Conciliators and Arbitrators consist of persons designated by member States, which is not more than four members and may or may not be its Nationals. In addition, the Chairman of the Administrative Council may designate up to ten persons (each having different nationalities).[11]

2.2 *Procedure*

Arbitration under ICSID is a self-contained procedure. It is governed by two legal instruments, the **ICSID Convention** and the **ICSID Arbitral Rules** read together with the **BIT** or other investment agreements which exit between parties. ICSID tribunals derive their jurisdiction solely from the consent given by countries in the BIT. The first case in which BIT was invoked for the consent to arbitration is *Asian Agricultural Products Limited v. Democratic Socialist Republic of Sri Lanka*[12] and also ICSID Convention-Arbitral Rules governed the proceeding. The procedure is not only governed by the Convention, but also is managed by ICSID Secretariat. He reviews the request for arbitration and is under obligation to register it unless he finds that the dispute is outside the jurisdiction of the Centre.[13] Appointment of Arbitrator takes place by the Claimant, Respondent and also this can be done by Security-General. This is how ad-hoc Tribunal is constituted for each case. Then the session hearing starts. The Tribunal decides procedure with respect to admission of evidence and other procedural part. Thereafter after the hearing it renders its award.

[6]SINGH, SIMA AND JAIN, SANKALP, *International Centre for the Settlement of Investment Disputes & Its Role in Alternative Dispute Resolution*, http://ssrn.com/abstract=2460871, (Last Checked on 15th Oct, 2016)
[7]Art. 45, ICSID Convention,1965 - Due process means being given proper notice of the appointment of the arbitrator or of the arbitration proceedings and being given full/adequate opportunity to present one's case.
[8] *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13
[9] Article 4, International Centre for Settlement of Investment Dispute Convention, 1965.
[10]Article 10(1), International Centre for Settlement Investment Dispute Convention, 1965.
[11]Article 13, International Centre for Settlement Investment Dispute Convention, 1965.
[12] ICSID Case No. ARB/87/3
[13] Article 36(3), International Centre for Settlement Investment Dispute Convention, 1965

This is the standard procedure which is followed nearly in every case. The Convention and Arbitral Rules also provide detailed procedural rules for such issues as hearings, language, memorials, confidentiality, costs of the proceeding, etc.

2.3 *Annulment of Award*

This is another major aspect of ICSID arbitration in which one party wishes to challenge the order and get it annulled. Any party can apply for annulment to the Secretary-General on specific grounds only which are laid down in **Art.55** of the Convention:

- Where Tribunal was not constituted properly
- It has exceeded its power
- Any of its members is corrupt,
- Also if reasons were not given on which reward is based.

An *adhoc* annulment is formed for looking into the same by the Secretary-General. Then the matter is decided. If the award is annulled then at then at the request of either party it can be submitted to a new Tribunal, as per Art-53 of the Convention. The *ad hoc* committee in *CMS Gas Transmission Company v. Argentine Republic*[14] held that a decision should not be annulled even if it suffers from "*defects*," "*manifest errors of law*," and "*lacunae and elisions*," because the annulment committee exercises its jurisdiction under a limited mandate. The annulment committee "*cannot simply substitute its own view of the law and its own appreciation of the facts for those of the Tribunal*."

2.4 *Additional Facility*

The Additional Facility (AF) Rules were adopted by Administrative Council in 1978 to facilitate the use of the extensive ICSID facilities in situations where either the host state or the foreign investor's state is not an ICSID party. Since one or the other is not ICSID party, the Convention itself is inapplicable. Arbitration under the AF is thus, governed by the AF rules and the investment agreement. For enforcement of Additional Facility Awards, The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 can be invoked.[15] *Metalclad Corporation v. United Mexican States*[16] is the first AF Arbitration Case which was registered in 1997.

3. ICSID NEED OF THE HOUR- CRITICAL ANALYSIS

The lure of developing and undeveloped markets in countries has attracted competent investors from around the world. With the increase in trade and commerce around the globe, the disputes between the host country and the investors are at a raise. The traditional international method to protect the rights of foreign investors was 'diplomatic protection' by the investor's country of nationality against the host State of the investment. But there were many disadvantages attached to the same, as diplomatic protection is discretionary, it may or may not be granted to investors and also before seeking diplomatic protection the investor should have exhausted all the other remedies. Therefore, the need for international arbitration arose and ICSID was the first of its kind.

In the light of the above, many investment treaties were signed between countries. The main advantage with ICSID is that these treaties which are signed itself contained a clause that in

[14] CMS Gas Transmission Company v. Argentine Republic, ICSID Case No: ARB/01/8
[15]The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (330 UNTS 38, 7 ILM 1047)
[16] Metalclad Corporation v. United Mexican States, ICSID Case No: ARB(AF)/97/1)

case of any dispute the parties will resort to ICSID. It is proved to be one of the most popular multilateral arbitration regimes.[17]

Also, ICSID initially takes away the jurisdiction in case of dispute from the municipal courts but later it empowers the courts to enforce the decision. Its award shall be recognized by the parties and hold the status similar to that of the final judgment delivered by a court of that State. If the parties fail to enforce the decision, it would be a violation of an international treaty and thus, would allow direct recourse to international law remedies.[18] ICSID acquires it jurisdiction through consent of the parties[19], which means **party autonomy** exits. Party autonomy in its absolute sense means that the parties control all aspects of the proceedings (the composition of the arbitral tribunal, the rules governing the proceedings themselves and the language). Also, the parties feel that since this is an international forum the element of biasness and favourism will be absent. Therefore, with the increase in development and the present policies of liberalization in countries, the institute like ICSID plays a very important role. Due to its advantages over any other method of dispute settlement, it is now-a-days widely used by countries.

4. CHALLENGES AND DRAWBACKS- INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

The International Centre for Settlement of Investment Dispute was set up in 1965. Nevertheless, after having such a long history of establishment it appears that it has not gained confidence of many States. There are many challenges faced by this International Arbitration forum and the most peculiar of them being lack of cooperation by developing states.

4.1 *Appointment of Arbitrators*

Before each hearing an Arbitrator's panel consisting of 10 members is formed. Out of the ten members, four are to be appointed by the contracting parties. But the major problem arise when developing countries who are the members have either not appointed the candidates to serve on the panels or public officials who do not possess knowledge of law and nor have time; have been appointed for serving on the panel.[20]

Therefore, active participation and co-operation is required by the developing states. They should be encouraged and perks of being a member of such an International Forum should be made known to these States by means of conferences etc. Efforts can be made to train lawyers and other persons of legal fraternity in matters concerning settlement of transnational disputes.

4.2 *Increasing cost of International Arbitration*

This is also one of the major issues in case of International Arbitration. The contracting parties resist coming to the International Forum because they believe in the fact that this will incur huge costs. ICSID continuously gets financial support from World Bank, so to encourage this method of dispute resolution; ICSID should make efforts to lower the burden on the parties.

4.3 *Investor Centric*

[17] Singh, *Supra* Note 5

[18] International Centre for Settlement Investment Dispute Convention, Art 25(1)

[19] *Lanco v. Argentina*, ICSID Case No: ARB/97/6

[20] Ibrahim H. I. Shihata, *Obstacles Facing International Arbitration* (1986) Berkeley Law Scholarship Repository, available at: http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1046&context=bjil (Last Checked on : 1st July, 2016)

There is always a complaint that ICSID is exclusively in favour of investors leaving behind the interest of both country. It being a 'neutral mode' of dispute resolution should be absolutely impartial.

4.4 *No Measurable Effect on Economy*

The purpose of ICSID is to build trust amongst investors so they could invest and do business with other countries freely, but the statistics show that even after investment treaties came into force there is no statistically relevant effect on the economic development of the contracting parties. [21]Moreover, countries have entered into Bilateral Investment Treaties which governs cross border trades.

4.5 *Enforceability of Award passed by ICSID*

The award passed by any international forum finds difficulty in enforcement. Likewise, the award passed by ICSID can be enforced in the territory of member States subject to their law on sovereign immunity. This makes it difficult to enforce the award in many circumstances. ICSID do not have a formal role to play in the case of enforcement, it is the domestic courts which have the sole responsibility of enforcing the international decree. This makes enforcement of award of ICSID a big challenge for the parties to the arbitration.

5. INDIA NOT A CONTRACTING PARTY TO ICSID

ICSID's use has further given rise to increase in international capital flows, particularly foreign investment. However, some countries such as India and Brazil, which do attract largest amount of foreign investment, are not the contracting parties to ICSID.[22] India refrained from being a part of the ICSID as it felt it would compromise on its sovereignty.

When the Convention came into force India was not economically strong and it was not open to any foreign investments. It is relevant to note that India is a member of the New York convention. However, India concluded its first BIT (Bilateral Investment Treaty) with the United Kingdom on 14 March 1994. Since then India has signed many BIPAs (Bilateral Investment Promotion and Protection Agreements) and under this the host state undertakes to provide certain minimum protections to an investment made in accordance with the BIPA concerned. However, India has been involved in many disputes with Foreign Investors, recent of them being the 2G Spectrum Case & Vodafone dispute. It can be seen that ultimately the investor has to come to the domestic courts of India or the domestic courts have a right to interfere in the foreign awards. This will definitely prevent investors to invest in India. To add to this the uncertainty in deciding disputes, the time involved in adjudication will definitely prevent the investors.

Therefore, it is hereby suggested that India should be a signatory to ICSID as this will ensure certainty in cases of dispute. Also, the adjudication will be completed within time and the investor state will have satisfaction that the dispute has been decided fairly and India will gain trust of the investors. This will boost up the investment in India. Thereby improving the economic conditions and boosting the growth.

6. CONCLUSION AND SUGGESTION

The research is an overview of dispute settlement in investment matters in International Forum. There is only one International Centre for investment conflicts which exists and i.e. ICSID. The ICSID Convention, 1965 was indeed a significant development towards establishing a

[21] Christoph Schreuer, *Why Still ICSID?,* http://www.univie.ac.at/intlaw/wordpress/pdf/why_still_icsid.pdf (Last Checked on: 15th Oct, 2016)

[22] The International Center for the Settlement of Investment Disputes (ICSID), Bretton Woods Project, 2009, http://www.brettonwoodsproject.org/art-564868 (Last Checked on: 5th Nov, 2016)

system under which individuals and corporations could demand redress directly against a foreign State by way of conciliation or arbitration. There are any advantages to the parties who resort to ICSID. For the member states, the award given by the Tribunal is directly enforceable without judicial review of that country. Also, in 1978 with the acceptance of Additional Facility Rules, the scope of the Centre has increased and now even the parties who are not the signatories to the Convention can also approach the ICSID Tribunal.

But, as every coin has two sides; there are certain provisions which the ICSID does not serve well. It can be seen that the Centre functions on an *adhoc* arbitration panel and not a permanent court, institutional arbitration or tribunal. Also, in the Convention there is no formal procedure laid down for appeal of awards. However, there can be review of the award, but in that also the review committee does not have the power to overrule the judgment of the Tribunal. However, the provision for appeal can be included in the Convention through an amendment. But the adhoc arbitration panel should only carry out the functioning as this shows party autonomy and is in good faith.

One major drawback with ICSID is not only does the ICSID Convention fail to provide any definition of what constitutes an 'investment', the drafters of the ICSID Convention, in fact, made an express decision not to include such a definition. This absence has given rise to interesting issues of interpretation as ICSID tribunals have sought to arrive at an understanding of how the term 'investment' should be properly understood for the purposes of the ICSID Convention.

While examining India's stand on ICSID Convention, it can be seen that since earlier India was not open to liberalization and thereby is not a signatory of ICSID. However, it is seen that ICSID attempts to give private parties access to international dispute resolution. This enables private investors to feel safe in their dealings with host countries and the host countries are assured of the absence of international politics in their commercial relations with private investors. Therefore, with the increase in the foreign investment and to continue to boost the same, Indian lawmakers should try to strike balance between Sovereignty and investor protection.