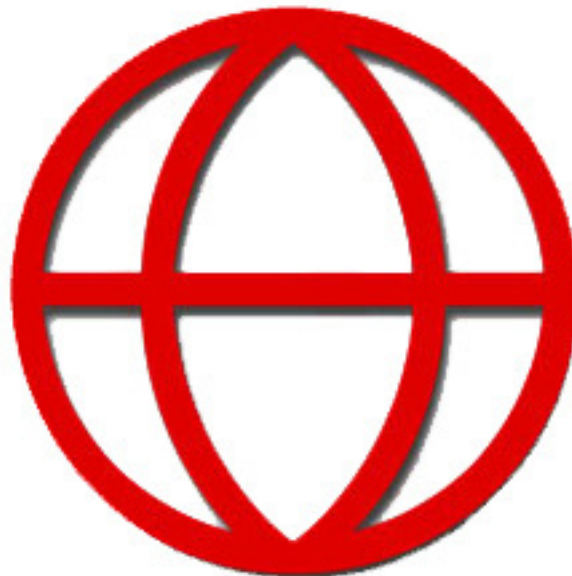


A paper on the

**International Centre for Settlement of  
Investment Disputes (ICSID)**



within the scope of a seminar on international arbitration  
held by Prof. Dr. Peter Schlosser in 1999.

Submitted by Sebastian Ritze, Munich, Germany  
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#### **Additional material in the World Wide Web**

ICSID website

[www.worldbank.org/icsid/](http://www.worldbank.org/icsid/)

Rules & provisions concerning ICSID

[www.worldbank.org/icsid/](http://www.worldbank.org/icsid/)  
[www.internationaladr.com/](http://www.internationaladr.com/)

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## International Centre for Settlement of Investment Disputes (ICSID)

### A. Introduction

On March 18, 1965, the International Centre for the Settlement of Investment Disputes (ICSID) was established under the auspices of the International Bank for Reconstruction and Development (IBRD) by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (also called the Washington Convention). The Centre is one of the five international organisations that make up the World Bank Group. The Convention<sup>1</sup> entered into force on October 14, 1966.

The Centre was established to provide facilities for the conciliation<sup>2</sup> and arbitration of investment disputes and to promote the flow of foreign investment between developed and developing countries, bearing in mind the need for international cooperation for economic development. It was often unforeseeable if the enforcement of an award that was rendered locally in favour of the investor would be carried out. Since a neutral forum for foreign investors was previously non-existent, the establishment of the centre has to be viewed as an effort to provide such a forum for the settlement of disputes arising out of investments. So far it represents a unique model in international law, since the Centre operates in total independence from domestic legal systems<sup>3</sup>. The domestic courts sole role is the assistance in the enforcement of the awards rendered by the arbitral tribunal. There is no right to appeal or

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<sup>1</sup> In 1984, both conciliation rules and arbitration rules were revised

<sup>2</sup> The Rules of Procedure for Conciliation Proceedings and issues relating to conciliation will not be discussed in this paper.

review the award by any domestic court.<sup>4</sup> The signatories agreed to recognise that an award rendered by an ICSID tribunal as if it was a final judgement of their own court.

The centre itself is not engaged in conciliation and arbitration but assists in the initiation of conciliation and arbitration proceedings, performing a variety of procedural and administrative functions.

### **I. Recent developments and statistical data**

According to ICSID's latest semi-annual publication "News from ICSID" in regard to the membership, the number of signatories of the convention increased to 146 and the number of Contracting States to 131<sup>5</sup>.

So far, 37 cases have been concluded since the founding of the Centre and the number of pending cases has increased to 25<sup>6</sup>, which is more than at any other time in the Centre's history. Since 1997 ICSID experienced a remarkable upsurge in new disputes being submitted to arbitration.

## **B. Organisation and structure of the ICSID**

ICSID consists of two bodies, the Administrative Council and the Secretariat.

### **I. Administrative Council**

The Administrative Council is the governing body of the Centre and its function consists of various administrative tasks, e.g. approving ICSID's annual report and its administrative budget. It is comprised of one

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<sup>3</sup> Augenblick, Ridgway, Dispute Resolution in World Financial Institutions, 10 J. Int'l Arb. 73, 78–80 (1993);

<sup>4</sup> Derman, Nationalization and the Protective Arbitration Clause, 3 J. Int'l Arb. 131, 144 (1988).

<sup>5</sup> A list of contraction states and other signatories of the convention is attached as Annex 1. As of June 30, 1998 the former Yugoslav Republic of Macedonia and Namibia have signed the convention.

<sup>6</sup> ICSID News, [www.worldbank.org/icsid/news/n-16-1-2.htm](http://www.worldbank.org/icsid/news/n-16-1-2.htm)

representative from each Contracting state, each being able to express one vote. The Chairman of the Council is the President of the World Bank ex officio, who has no voting power.

## **II. Secretariat**

The Secretariat is comprised of the Secretary-General, Deputy-Secretaries-General and the staff. Every six years, the Administrative Council appoints the Secretary-General, who is ICSID's legal representative and the head of the Secretariat, upon the nomination by the Council's Chairman. Duties of the Secretary-General are appointment and dismissal of staff members, the registration of requests for arbitration and conciliation, the authentication and certification of final arbitral awards and various other tasks. He also appoints a secretary for each arbitral tribunal.

The Secretariat supervises the constitution of the arbitral tribunals as set forth in the convention.

## **C. Arbitration procedures**

Before turning to the procedural questions, it must be stressed that the tribunal is accorded competence de la competence (Kompetenz Kompetenz). The duty to determine its own competence according to Art. 41 (1) also means that a tribunal that does not believe to be within its own competence has to render an award to that effect<sup>7</sup> (Rule 42 (5)).

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<sup>7</sup> Thompson, The Klöckner v. Cameroon Appeal: A Note on Jurisdiction, 3 J. Int'l Arb., No. 2, at 93 (1986).

## I. Constitution of the arbitral tribunal

### 1. The Panel of Arbitrators and Conciliators

ICSID maintains a panel of arbitrators and conciliators<sup>8</sup> from which parties may select individuals to resolve the submitted dispute. Each of the contracting states may designate 4 arbitrators and 4 conciliators of any nationality (Art. 13) with the appropriate expertise. According to Art. 14 persons designated to serve on the panels shall be of high moral character and of recognised competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgement. The Chairman of the Administrative Council may furthermore designate an additional 10 persons to the panel of arbitrators and the panel of conciliators<sup>9</sup>.

### 2. General remarks

The conventions permits the parties to agree on a single arbitrator or any uneven number of arbitrators as set forth in Art. 37 (2) (a). Usually<sup>10</sup> an arbitral tribunal will consist of one arbitrator appointed by each party and a third, presiding arbitrator appointed by agreement<sup>11</sup> of the parties. Where the parties do not agree upon the number of arbitrators, the tribunal will consist of three arbitrators (Art. 37 (2) (b)), being selected by the parties. To ensure a neutral forum, the majority of the arbitrators in the tribunal may not be of the same nationality as the parties to the dispute, except all arbitrators of the tribunal have been appointed by agreement of both parties<sup>12</sup>.

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<sup>8</sup> a complete list of all arbitrators and conciliators for all contracting states can be found at <http://www.worldbank.org/icsid/pubs/icsid-10/icsid-10.htm>

<sup>9</sup> News from ICSID, Volume 16, No.1 (Winter 1999), p. 11; Art. 13 (2)

<sup>10</sup> Parra, The Role of ICSID in the Settlement of Investment Disputes, News from ICSID, Vol. 16 No.1, 5

If the tribunal has not constituted within 90 days after the notice of registration, the Chairman of the Administrative Council will appoint the arbitrators not yet appointed by the parties. In practice<sup>13</sup>, this appointment will be based on the recommendation of the Secretary-General. Whereas usually the parties may appoint any arbitrator with due regard to Art. 14 (1), the Chairman of the Administrative Council is limited to the panel of arbitrators<sup>14</sup> (and conciliators) for the designation of the remaining members of the arbitral tribunal. This process shall be carried out in consultation with the parties as far as possible.

## II. The Issue of Consent (Art. 25)

According to Art. 25 (1) both parties to the dispute have to consent to the arbitration by ICSID in writing and may not unilaterally withdraw consent.

Obviously, written consent may be issued in the traditional way by including an express ICSID arbitration clause in the investment agreement. Another possibility<sup>15</sup> consent may be given is when a state consents to ICSID arbitration in its investment law or bilateral investment treaties (BITs). This offer by the state, which may require certain actions or procedures from the investor, can be accepted in writing by the investor. Consent does not have to be recorded in every instrument as long as each contract may be identified a part of a whole scheme (e.g. where the individual contracts refer to an arbitration clause).

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<sup>11</sup> The parties may also agree that the arbitrators shall elect the presiding arbitrator, Rule 4, Arbitration Rules

<sup>12</sup> General Obligations, Rule 1, Arbitration Rules

<sup>13</sup> Parra, The Role of ICSID in the Settlement of Investment Disputes, , News from ICSID, Vol. 16 No.1, 5

<sup>14</sup> Each member of a panel serves for a period of six years, which is renewable.

<sup>15</sup> Delaume, ICSID Arbitration: Practical Considerations, 1 J. Int'l Arb. 101, 104 (1984)

When a state ratifies the convention, it merely expresses its willingness to make use of the ICSID facilities - it is by no means an obligation to use this machinery. A duty to make use of ICSID only arises, when in the particular circumstances both parties have consented to ICSID arbitration for a specific investment. A state may therefore exclude certain classes<sup>16</sup> of disputes by notifying ICSID (Art. 25 (4)).

The question, whether consent should be construed restrictively or broadly has been answered by the tribunal in the case of *Amco-Asia Corp. et al. v. the Republic of Indonesia*<sup>17</sup>:

"...is not to be construed *restrictively*, nor as a matter of fact, broadly or liberally. It is to be construed in a way which leads to find out and respect the common will of the parties: such a method of interpretation is but the application of the fundamental principle *pacta sunt servanda*, a principle common, indeed, to all systems of internal law and international law."

ICSID has published a number of model clauses<sup>18</sup>, which may read as follows (Model Clause I):

*"The parties hereto hereby consent to submit to the International Centre for Settlement of Investment Disputes any dispute in relation to or arising out of this Agreement for Settlement by conciliation/ arbitration pursuant to the Convention on the settlement of Investment disputes between States and Nationals of Other States."*

These model clauses should be altered in order to address specific problems that the parties to the agreement might foresee.

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<sup>16</sup> E.g. Guyana and Jamaica have excluded disputes concerning their "minerals and other natural resources" but in general very few notifications have been made.

<sup>17</sup> Mengel, Probleme der Zuständigkeit des International Centre for Settlement of Investment Disputes (ICSID), *Recht der Internationalen Wirtschaft* 1986, 941, 943.

<sup>18</sup> ICSID Model Clauses, Doc. ICSID/5/Rev. 2 (February 1, 1993)

### III. Parties (Ratione Personae)

The Convention requires that the dispute has to be 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...**"

#### 1. Contracting State

The definition of Contracting State raises some questions, especially when constituent subdivisions and agency of the state are concerned. Since the interpretation of more specific terms might limit the purpose of the Convention due to different connotations in different countries, the drafters of the Convention deliberately left the determination to the discretion of the Contracting States (Art. 25: "...designated to the Centre by that State").

Since such a designation is a prerequisite for the entity to give consent to ICSID arbitration, the investor is well advised to ascertain at the beginning of the negotiation, if that particular entity has been designated by its own government to be capable to give such consent. The investor should furthermore bear in mind that due to the unstable nature of developing countries (unrest, political and administrative changes) it may be necessary to address these possible changes directly in the instrument. If for example an entity to the agreement is substituted the question arises whether the new public body has consented to ICSID arbitration.

#### 2. Investor (national of another State)

The term "national" applies to both natural and juridical persons. Whereas a natural person must possess the nationality of another contracting state on the date when the consent to the jurisdiction of the Centre was given and at the time when the dispute is registered at the Centre, a juridical person only needs to have the nationality of another

state when consent was given.

However, due to the nature of most investment-agreements, it will only be necessary to discuss the problems involved with juridical persons.

The question, how the nationality of an corporation is determined<sup>19</sup> has been answered in *Amco-Asia et Corp. al. v. the Republic of Indonesia*. To determine the nationality of a corporation the tribunal came to the conclusion that the place of incorporation or the corporate seat is decisive.

A business that is for example incorporated in the US and then decides to invest in Jamaica is eligible to be a national of another Contracting State, whereas a subsidiary of a US business that is incorporated in Jamaica may not rely on ICSID facilities since both parties have the same nationality.

To account for the common situation that the government of the host state insists that the foreign investor set up their investment through a locally incorporated business, and the locally incorporated business is normally not eligible to be a party to ICSID arbitration, the Convention provides an interesting alternative to determine the nationality of a juridical person. Art. 25 (2) (b) provides:

["National of another Contracting State" means:] 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.

A subsidiary that is incorporated locally may thus be regarded as a national of a Contracting State if the controlling parent is incorporated

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<sup>19</sup> Niggemann, Zuständigkeitsprobleme der Weltbankschiedsgerichtsbarkeit im Licht der bisherigen Schiedsverfahren IPRax 1985, 185, 189; Broches, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States of 1965, Explanatory Notes and Survey of its Application, 18 Y.B. Com. Arb. 627 (1993); Delaume, ICSID Arbitration: Practical Considerations, 1 J. Int'l Arb. 101, 111 (1984).

in a Contracting State and both parties have agreed that the subsidiary should be treated as a national of another Contracting State.

This provision (Art. 25) severely increases the protection of the investment. Since a locally incorporated company would simply be regarded as a national, its only possibility exists in the exclusive reliance on the laws and remedies of the host states - considering the inadequate legal protection of some developing countries, this may turn out to be risky situation for the investor.

In *Amco-Asia et Corp. al. v. the Republic of Indonesia* the respondent tried to argue that the "controller" of the foreign business that set up the locally incorporated subsidiary was not a national of another Contracting State and therefore the tribunal lacked jurisdiction. The tribunal came to the following conclusion:

"To take this argument into consideration, the Tribunal would have to admit first that for the purpose of Art. 25 (2) (b) of the Convention, one should not take into account the legal nationality of the foreign juridical person which controls the local one, but the nationality of the juridical or natural person who control the controlling juridical person itself: in other words, to take care of control at the second, and possibly third, fourth, or Xth degree.

Such reasoning is, in law, not in accord with the Convention. Indeed, the concept of nationality is there a classical one, based on the law under which the juridical person has been incorporated, the place of incorporation and the place of the social seat."

In *Maritime International Nominees Establishment v. Republic of Guinea*<sup>20</sup> (which was first submitted to the American Arbitration Association) an interesting question<sup>21</sup> concerning the nationality of a party was raised but not answered. Mine and Guinea entered into a joint venture agreement, specifying that Mine should be regarded as a Swiss company, since Mine was a Lichtenstein company and Lichtenstein was not a signatory of the ICSID Convention. Mine argued that the arbitration clause was not applicable because it exceeded the scope of the convention: The Convention would only apply if the company had been incorporated in the host state and not in a third state. An agreement to regard a company incorporated in a third state, as a national of another Contracting State is not covered by the Convention.

Consent is being regarded as the cornerstone of the Convention and consequently, no harm is done if a state party is granted the discretion to decide, whether it considers the company as a national of another Contracting State.

Similarly, the transfer of contractual rights from the investor (assignor) to a third person (assignee) has been discussed<sup>22</sup>. As long as the assignee has the same nationality as the assignor or the nationality of another contracting state this poses no serious problem. These will only have to be dealt with if the assignee were incorporated in the host state or a non-Contracting State. *Delaume* argues that this might cause the

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<sup>20</sup> Sturzenegger, ICSID Arbitration and Annulment for Failure to State Reasons—The Decision of the Ad Hoc Committee in *Maritime International Nominees Establishment v. The Republic of Guinea*, 9 J. Int'l Arb. 173 (1992).

<sup>21</sup> Niggemann, Zuständigkeitsprobleme der Weltbankschiedsgerichtsbarkeit im Licht der bisherigen Schiedsverfahren, IPRax 1985, 185, 189

<sup>22</sup> *Amco-Asia et Corp. al. v. the Republic of Indonesia*; *Delaume*, ICSID Arbitration: Practical Considerations, 1 J. Int'l Arb. 101, 117 (1984); .

assignment to be defective but clarifies in note 48<sup>23</sup> that according to another author, a strict reading of Art. 25 (2) (b) of the Convention can lead to a different result. According to this opinion, the requirement of nationality must be satisfied only at the time of consent to ICSID arbitration.

#### **IV. Subject Matter (Ratione Materiae)**

The Convention furthermore requires (Art. 25 (1)) that the dispute must be one "arising directly out of an investment" and that the dispute must be a legal one. The Convention itself provides no definition for the term "investment" which is purposefully<sup>24</sup> omitted to accommodate traditional types of investment such as capital contributions and new types of investment such as service contracts and transfers of technology. The parties are advised in case of new types of investment (according to the ICSID model clauses) to record in the instrument their consent that the particular transaction between them constitutes an investment for the purpose of the convention<sup>25</sup>.

The subject matter, therefore, can be anything (sale of arms, training of staff, constructions in general) as long as the parties have agreed that it should be regarded as an investment for the purpose of ICSID arbitration<sup>26</sup>. In this respect the question whether ICSID is in breach of the Convention by accepting all commercial transactions as investments under the Convention has been addressed<sup>27</sup> but not answered. The same problem has been discussed concerning the determination of the

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<sup>23</sup> Delaume, ICSID Arbitration: Practical Considerations, 1 J. Int'l Arb. 101, 116 (1984).

<sup>24</sup> Delaume, ICSID Arbitration: Practical Considerations, 1 J. Int'l Arb. 101, 117 (1984).

<sup>25</sup> Schlosser, Das Recht der internationalen privaten Schiedsgerichtsbarkeit, S. 98, Rn 98; Delaume, ICSID Arbitration: Practical Considerations, 1 J. Int'l Arb. 101, 119.

<sup>26</sup> Nathan, Submission to the International Centre for Settlement of Investment Disputes in Breach of the Convention, 12 J. Int'l Arb. 27 (1995).

<sup>27</sup> Nathan, Submission to the International Centre for Settlement of Investment Disputes in Breach of the Convention, 12 J. Int'l Arb. 27, 36 (1995).

nationality of a company that has been incorporated in a third state. Considering that the convention was drafted at a time when most investments took the form of concessions, establishment agreements, joint ventures or loans it may be submitted that as long as both parties agree that the transaction of the investor should be considered as an investment according to Art. 25 this poses no serious problem. In the absence of such an agreement, the tribunal has to determine the character of the agreement by taking into account the investors and the states point of view.

#### **V. Non-appearance of the respondent (default)**

The convention empowers a tribunal that has been constituted to continue the proceedings despite the failure of a party to appear<sup>28</sup>. It may furthermore render an award at the request of the other party who must prove his assertions to the satisfaction of the tribunal according to Article 45 and Rule 42 ICSID Arbitration Rules. The party has to establish the following requirements to the satisfaction of the tribunal<sup>29</sup>:

- a) That the Centre has jurisdiction
- b) That the tribunal is competent to hear the dispute (competence)
- c) The assertions of the party present are "well-founded" in fact and in law

#### **VI. Applicable Law**

The tribunal has to decide the dispute in accordance with such rules of law as may have been agreed by the parties or, in absence of such an agreement, in accordance with the law of the State party to the dispute

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<sup>28</sup> In both cases the respondent failed to appear: Alcoa Minerals of Jamaica, Inc. V. Government of Jamaica, ICSID Case No. ARB/74/2; Liberian Eastern Timber Corporation v. Government of the Republic of Liberia, ICSID Case No. ARB/83/2

and such rules of international law as may be applicable (Art. 42). As a general rule it is therefore the parties' unlimited autonomy to agree on the applicable law. The term "rules of law" rather than "law" leaves the parties great flexibility. It is therefore possible to include certain provisions from any national law or exclude certain provision. This advantage led to the adoption of this term into the UNCITRAL Model Law on International Commercial Arbitration<sup>30</sup>.

Commonly the host state will try to impose its local law on the investor in the arbitration agreement and would not mind to achieve no agreement, knowing that in case of a failure to agree on the applicable law, the law of the State party to the dispute will be applied. This may be justified, since the investment is also realised in the Contracting State. But this might also affect the attractiveness of ICSID arbitration since the local law might be hostile to foreign investment, it might have inconsistencies or might simply lack the applicable provisions. Bearing these problems in mind, the convention provides for the application of international law<sup>31</sup>.

The tribunal will consequently look at the law of the State party first (if agreed upon or by virtue of Art. 42 (1)) and may decide to refrain from applying that national law if it is in conflict with international law. In the Amco Asia cases the tribunal held that where there are applicable host state laws, they must be checked against international law, which will prevail in case of conflict.

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<sup>29</sup> Nathan, Submission to the International Centre for Settlement of Investment Disputes in Breach of the Convention, p. 37; Art. 45, Rule 42 Arbitration Rules

<sup>30</sup> Broches, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States of 1965, Explanatory Notes and Survey of its Application, 18 Y.B. Com. Arb. 627, 667 (1993)

<sup>31</sup> it is noteworthy to mention that the literature discusses the possibility to exclude the application of international law.

## **D. Challenge of the Award**

In Principle, an award under the ICSID convention is final. There is no right to appeal or review (even if there are public policy<sup>32</sup> concerns) the award by any domestic court.<sup>33</sup> The Contracting States have guaranteed that they will comply with the enforcement of any ICSID award without the possibility of an challenge. However, this does not mean that the parties have no access to any remedies. The Convention itself provides specific means to challenge an award but these have to be exercised internally<sup>34</sup>.

### **I. Annulment Art. 52**

Once a party has request an annulment, the Chairman will set up an Ad-Hoc committee consisting of three members<sup>35</sup>.

In case of a successful annulment of the award the dispute is resubmitted to a new arbitral tribunal and the arbitration process starts all over again. The new award may be subject to another annulment procedure<sup>36</sup>.

The governing provision concerning the annulment of an award is Art. 52 (1) of the Convention, whereby either party may request annulment of the award based on one or more of the following grounds<sup>37</sup>:

- that the Tribunal was not properly constituted

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<sup>32</sup> Schlosser, Das Recht der internationalen privaten Schiedsgerichtsbarkeit, S. 78, Rn 102

<sup>33</sup> Derman, Nationalization and the Protective Arbitration Clause, 3 J. Int'l Arb. 131, 144 (1988); Schlechtriem, Zur Überprüfbarkeit von ICSID-Schiedssprüchen: Die Aufhebungsentscheidung im Falle Klöckner/ Kamerun, IPRax 1986, 69, 70

<sup>34</sup> Augenblick, Ridgway, Dispute Resolution in World Financial Institutions, 10 J. Int'l Arb. 73, 79 (1993).

<sup>35</sup> Niggemann, Das Washingtoner Weltbankübereinkommen von 1965—Das Nichtigkeitsverfahren im Ad-Hoc-Komitee, Jahrbuch für die Praxis der Schiedsgerichtsbarkeit 1990, 97, 103.

<sup>36</sup> Bruno, Access of Private Parties to International Dispute Settlement: A Comparative Analysis, <http://www.law.harvard.edu/Programs/JeanMonnet/papers/97/97-13.html>

- that the Tribunal has manifestly exceeded its powers
- that there was corruption on the part of a member of the Tribunal
- that there has been a serious departure from fundamental rule of procedure
- that the award has failed to state the reason on which it is based

Initially the annulment process has been subject to sharp criticism, since of the first nine ICSID cases that went to award, two were annulled. It was feared<sup>38</sup> that under the current annulment procedure, ICSID arbitration will always be subject to more than one proceeding<sup>39</sup>. The advantage of a single proceeding with the result of an award that may be enforced in any of the Contracting States seemed to be fading. Fortunately, the concerns have somewhat diminished<sup>40</sup>, due to the rendition of more recent awards which have not been challenged and the issuance of ICSID decisions clarifying the standards for annulment.

## II. Revision Art. 51

For the first time in history, a request<sup>41</sup> for revision according to Article 51 of the ICSID Convention has been submitted to the Secretary-General in January 1999. A decision has not yet been published.

Art. 51 (1) provides the following:

"Either party may request revision of the award [ ...] on the ground of discovery of some fact of such a nature as decisively to affect the award,

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<sup>37</sup> Augenblick, Ridgway, *Dispute Resolution in World Financial Institutions*, 10 J. Int'l Arb. 73, 79 (1993).

<sup>38</sup> Gaillard, *The International Centre for Settlement of Investment Disputes*, <http://www.nylj.com/>

<sup>39</sup> Niggemann, *Die dritte Annullierung eines ICSID-Schiedsspruches—Die Entscheidung in Sachen Mine v. Guinea*, IPRax 1991, 77-84

<sup>40</sup> Delaume, *Reflections on the Effectiveness of International Arbitral Awards*, 12 J. Int'l Arb. 5, 16 (1995).

<sup>41</sup> *American Manufacturing & Trading, Inc. V. Democratic Republic of Congo (Case ARB/93/1) - Revision Proceeding*

provided that when the award was rendered that fact was unknown to the tribunal [...]."

### **III. Interpretation Art. 50**

Interpretation has not been requested yet. It deals with the interpretation of the award, i.e. the meaning or the scope of the award.

### **E. Additional Facility**

The Additional Facility was established in 1978 to administer certain proceedings between States and nationals of other states that do not fall within the scope of the Convention. This means that the requirements *ratione personae* and/ or *ratione materiae* have not sufficiently been established (i.e. one party is not a Contracting State or a national of another Contracting State<sup>42</sup>, and the dispute does not directly arise out of an investment<sup>43</sup>).

Awards that are rendered under the Additional Facility rules are not governed by the ICSID Convention and therefore the final award is not insulated from national law. The recognition and enforcement will consequently be governed by the law of the forum. To insure the widest international recognition and enforcement, arbitration proceedings may be held only in states that are parties to the New York Convention of 1958.

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<sup>42</sup> Leahy, Orentlicher, Enforcement of Arbitral Awards Issued by the Additional Facility of the International Centre for Settlement of Investment Disputes (ICSID), 2 J. Int'l Arb., No. 3, 15,16 (1985).

<sup>43</sup> Broches, The 'Additional Facility' of the International Centre for Settlement of Investment Disputes (ICSID), 4 Y.B. Com. Arb. 373, 374 (1979).

## **F. Fees**<sup>44</sup>

The "Administrative and Financial Regulations" provide in Chapter III, Art. 14 - 19 for the costs involved in ICSID arbitration and conciliation. Compared to other institutions such as the International Chamber of Commerce (ICC) fees are generally modest. In contrast to the ICC and the DIS (Deutsche Institution für Schiedsgerichtsbarkeit), where the fees are determined by the amount in controversy, the Centre's fees are based upon actual costs incurred by its subsidised staff<sup>45</sup>. The designation of arbitrators by the Secretary-General upon request of other arbitration institutions is free of charge<sup>46</sup>.

### **I. Fees and Expenses of Arbitrators**

Members of arbitral Tribunals constituted under the Convention are entitled to receive the fees, per diem subsistence allowances, travel and other expense reimbursements referred to in Administrative and Financial Regulation 14(1) of the Centre.

The standard level of the fees referred to above is at present US\$ 1,100 per meeting day or 8-hour day of other work. The parties are obviously free to agree on other fees.

Furthermore arbitrators are entitled to per diem subsistence allowances and travel expenses. The standard rate is currently US\$ 115 per day.

Special rates apply to high cost cities. Presently three categories exist: US\$ 185, US\$ 170, US\$ 135. These allowances are granted to arbitrators that are away from their normal place of residence. They are considered to cover all personal expenses such as lodging, meals, personal

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<sup>44</sup> A memorandum on fees and expenses of ICSID arbitrators as of April 1999 can be found on ICSID's website: [www.worldbank.org/icsid/pubs/memorandum/memorandum.htm](http://www.worldbank.org/icsid/pubs/memorandum/memorandum.htm)

<sup>45</sup> Derman, Nationalisation and the Protective Arbitration Clause.

<sup>46</sup> Delaume, p. 122; Niggemann, Zuständigkeitsprobleme der Weltbankschiedsgerichtsbarkeit im Licht der bisherigen Schiedsverfahren, IPRax, 185, 186

communications, tips and other expenses that are not specifically reimburseable.

In addition to the above mentioned fees an per diem subsistence allowances, travel expenses within the limits set forth in Administrative and Financial Regulations 14 will be reimbursed as well.

## **II. Fees and other administrative charges**

A non-refundable fee of US\$1,000 is payable to the Centre by the party or parties requesting the institution of arbitration proceedings.

Moreover administrative charges from the Secretariat for actual costs incurred will apply. These include expenses for communications services and for the services of persons (such as interpreters, reporters and secretaries) especially engaged by the Centre for the proceeding concerned.

Special services that a party is requesting the Centre to perform (such as the provision of translations or copies) must be deposited in advance and should be sufficient to cover the resulting charges. Charges are determined on the basis of rates established by the World Bank under its normal administrative procedures.

## **III. ICSID Additional Facility Fees**

Fees for the use of ICSID Additional Facility a very similar to those promulgated for arbitration.

## **IV. Who will pay the costs ?**

According to Art. 61 (2) the arbitral tribunal shall decide (except as the parties otherwise agree) how and by whom the expenses shall be paid.

This decision forms part of the award.

## **G. Outlook**

- Caseload will increase over the next years due to more bilateral investment treaties (BITS)
- The criticism concerning annulment procedure unfounded
- Differences to other arbitration institutions
- Binding awards/no revision
- Based upon consent - the parties may depart from the convention and determine what is applicable etc.

**What nationality is being attributed to a subsidiary, when the controlling business is a national of another Contracting State but the „Controller“ of the controlling business lacks this characteristic ?**

