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A Look at the International Centre for Settlement of Investment Disputes (ICSID) Based on a Conversation with an Elected ICSID Secretary-General, Martina Polasek, and a Review of the ICSID Convention and Arbitration Rules

by Ekaterina Long

I. Introduction

The purpose of this article is twofold. First, it will memorialize the points highlighted in the discussion between Dr. Claudia Frutos-Peterson and now-elected ICSID Secretary-General Martina Polasek concerning the development of ICSID over the past 23 years. Second, it will evaluate some of the changes ICSID underwent over the last 23 years by considering the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (Convention) and ICSID Arbitration Rules (Rules). The ICSID's other rules or regulations will be outside the scope of this article.

II. Background

As part of its ongoing series, the Institute for Transnational Arbitration (ITA) hosted a webinar in which Dr. Claudia Frutos-Peterson and now-elected ICSID Secretary-General Martina Polasek discussed the development of ICSID over the past 23 years. Their discussion centered on ICSID's unique role as the largest administrator of international investment disputes in the world and highlighted its most recent revision of the ICSID Regulations and Rules, which became effective July 1, 2022.

These revisions were important impetus for ICSID's member states and the public at large. Both groups advocated for the rules' equilibrium between the Contracting States and investors to ensure nonpartisanship. These revisions bolstered ICSID's credibility as an administrator of international investment disputes.

The revisions' other major function was to broaden dispute resolution vehicles to include rules promoting mediation. Because mediation is more cost- and time-

efficient, the rules increased the parties' ability to resolve their disputes faster and less expensively.

ICSID has four sets of regulations and rules as follows: (1) ICSID Administrative and Financial Regulations; (2) ICSID Institution Rules; (3) ICSID Conciliation Rules; and (4) ICSID Arbitration Rules.

The revisions were discussed, including the powers and obligations of the Secretary-General in registering a case for administration, the process of selecting an arbitral tribunal, the parties' ability to challenge an arbitrator, mechanisms curbing meritless challenges of an arbitrator, and special procedures involving cases that manifestly lack legal merit.

Although the discussion was focused, it needed to be more comprehensive. It did, however, provide foundational knowledge about ICSID and the services it provides to the international arbitration community that is valuable to any new arbitration practitioner. The discussion undoubtedly refreshed more seasoned practitioners' knowledge of the topic.

III. ANALYSIS

A. *The Historical Roots, Purpose, and Jurisdiction of ICSID*

To better understand ICSID's function in investor-state arbitrations, it is worthwhile to briefly look at the Centre's history and purpose. ICSID administers and coordinates impartial investor-state arbitral proceedings. It does not, however, resolve disputes. ICSID officially began on October 14, 1966, when 20 member governments of the World Bank ratified the Convention establishing it. Since then, the number of Signatories and Contracting States has grown to include 165 member states.

By signing the Convention, these states agreed to adhere to Article 25,[1] to eliminate jurisdictional battles alleging a sovereign immunity defense and allows investors to have a direct recourse through conciliation and arbitration of their

[1] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, art. 25, 17 U.S.T. 1270, T.I.A.S. 6090, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

disputes. By regulating the ICSID's jurisdiction, the Convention eliminates the risk of foreign investors becoming exposed to the procedural laws of the host state, thereby decreasing the legal uncertainty of how a given host state may approach a dispute with a foreign investor. The Convention boosts international investments and global economic development and growth by providing a de-politicized and established forum for administering conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States.

That said, Article 26 of the Convention allows Contracting States to require investors to exhaust local administrative or judicial remedies before States consent to conciliation or arbitration proceedings under the Convention.[2] If a State decides to require the exhaustion of these remedies, Article 32(2) permits it to object to ICSID's jurisdiction in adjudicating the dispute.[3] Investors may theoretically raise the jurisdictional objection under this article as well, although that would be highly unusual. They would have to rely on a basis that may exist outside the Convention or the Rules.

B. *ICSID's Structure*

ICSID experienced a significant expansion in the last two decades, manifesting a growing demand for conciliation and arbitration of investment disputes involving states or state-owned entities. In response to the growing demand, the Centre created 5 case management teams, increased its capacity to administer 3 hearings simultaneously at its hearing facilities, and expanded its linguistic reach to include not only English but also French and Spanish languages. There are about 300 pending cases at ICSID, with 50 cases registering yearly.

Most cases are based on bilateral or multilateral investment treaties that afford important procedural protection, such as the ability to redress violations of substantive rights through international arbitration. The North American Free Trade

[2] *Id.* art. 26.

[3] *Id.* art. 32(2).

Agreement (NAFTA), signed by Canada, Mexico, and the USA in 1994, was one of the most important multilateral investment treaties. The remainder of the cases are based on investment contracts with arbitration clauses.

ICSID has an Administrative Council consisting of one representative of each Contracting State, the World Bank's President serving as ex officio Chairman, and the Secretariat. Article 9 of the Convention provides that the Secretariat consists of a Secretary-General, one or more Deputy Secretaries-General, and staff.[4] The Secretary-General serves an important function as a gatekeeper. She receives requests for conciliation and arbitration proceedings and decides whether to register any given request based on its jurisdictional allegations. Articles 28(3) and 36(3) of the Convention permit the Secretary-General to refuse to register the request for conciliation and arbitration, respectively, if she finds that the dispute "is manifestly outside the jurisdiction" of ICSID.[5]

C. *Selection of an Arbitral Tribunal*

The Arbitration Rules allow the parties to decide how a tribunal should be selected and have a mechanism to enforce the selection should the parties disagree. Rule 15 allows the parties to agree on the number of arbitrators and the method of their appointment if that was not provided in the request for arbitration.[6] After registering the request, the parties must inform the Secretary-General of their selection agreement within 45 days.[7] Given that the tribunal selection is likely outcome-determinative, the parties should take their time to find the choice they feel comfortable with, and the Rules provide just about the right time. The parties may seek the Secretary-General's assistance with appointing an arbitrator or, if the parties opt to have a panel of arbitrators, the president.

However, if the parties fail to agree on an uneven number of arbitrators and the

[4] *Id.* art. 9.

[5] *Id.* arts. 28(3) & 36(3).

[6] ICSID Arbitration Rules (2022), r. 15(1) [hereinafter *Arbitration Rules*].

[7] *Id.*, Rule 15(2).

method of their appointment within the 45-day deadline, Rule 15(2) provides an enforcement mechanism in accordance with Article 37(2)(b) of the Convention.[8] That Article and Rule 16 of the Arbitration Rules mandate the tribunal to include three arbitrators, with one arbitrator selected by each party and the third arbitrator, who is to be the tribunal's president, being selected by the parties' agreement.[9] Article 38 of the Convention and Rule 18 of the Arbitration Rules permit the parties 90 days after the Secretary-General sends the notice of registration to the parties to select the tribunal.[10] Should the parties disagree on the tribunal, the Chairman will appoint the arbitrator or arbitrators after receiving a certain amount of input from the parties. The enforcement mechanism in Article 38 of the Convention and Rule 18 of the Arbitration Rules prevents the parties from delaying the proceeding and ensures that the proceeding moves forward.

D. *The Parties' Ability to Challenge Arbitrators and Mechanisms Curbing Meritless Challenges*

The Convention and the Arbitration Rules set forth a balanced framework for challenging an arbitrator. Article 57 permits a party to assert the challenge based on a "manifest lack of the qualities" that arbitrators must have to be able to serve in that capacity.[11]

Article 14(1) implicitly defines the term "manifest lack of the qualities" by requiring that arbitrators "be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment."[12] The article underscores a person's competence in the "field" of law as particularly important to arbitrators. Therefore, a party may validly challenge a selected arbitrator by asserting that the arbitrator should be disqualified

[8] *Id.*

[9] ICSID Convention, art. 37(2)(b); Arbitration Rules, Rule 16.

[10] ICSID Convention, art. 38; Arbitration Rules, Rule 18.

[11] ICSID Convention, art. 57.

[12] *Id.* art. 14(1).

because he or she is not competent in the field of law applicable to the dispute. Although this disqualification ground seems to be the most viable, a party may also challenge the arbitrator's conduct based on ethical violations, lack of partiality, or presence of a conflict of interest, all of which appear to fall within the scope of the "high moral character" standard outlined in Article 14(1) of the Convention.[13]

A party, however, cannot assert these or any other grounds without providing some support for the disqualification proposal. There must be a statement of the relevant facts, law, argument, and documents in support of the challenge in accordance with Rule 22(1)(b) of the Arbitration Rules that show the proposal to be meritorious and based on a genuine concern that a given arbitrator is unfit to adjudicate the dispute.[14]

The disqualification proposal is likely to frustrate the other party, delay the proceeding, and otherwise affect the resolution of the dispute. It should be noted that Rule 23 of the Arbitration Rules requires the arbitrators not subject to the proposal and the Chair to use "best efforts" to decide the merits of the proposal.[15] The "best efforts" standard is undefined in the Rules or Convention, which leaves abundant room for discretion in deciding whether the proposal is meritorious. For these reasons, the party considering asserting the proposal should carefully evaluate its merits before making it.

E. *Special Procedures Involving Cases that Manifestly Lack Legal Merit*

The Arbitration Rules have an entire chapter on special procedures concerning cases that may be filed for administration but manifestly lack legal merit. Rule 41 provides a specific mechanism that enables the parties to object to the substance of the claim.[16] This mechanism prevents all non-meritorious disputes, helping preserve the ICSID's docket for only those cases that truly need to be resolved.

[13] *Id.*

[14] Arbitration Rules, Rule 22(1)(b).

[15] *Id.*, Rule 23(3).

[16] *Id.*, Rule 41.

Although it may appear that these Rules could be misused by an objecting party to intentionally delay the ultimate resolution of a case that is meritorious by raising baseless objections to the substance of a case, the requirements that the party specify the grounds of its objection and support it with relevant facts, law, and arguments arguably serve as a natural deterrent to such potential misuses.

IV. CONCLUSION

It is no wonder that the ICSID has developed into a premier global forum for administrating investor-state disputes, given its credibility as an international dispute resolution institution. The fact that the ICSID began as a small organization that eventually evolved into a much larger institution is a testament to the successful way in which it administers investment disputes worldwide. The Convention and the Arbitration Rules exemplify how the ICSID administers and coordinates disputes. They certainly help fuel the ICSID's growth because they provide for a well-balanced and nonpartisan process of administering investor-state disputes, ultimately increases the ICSID's credibility.

By providing an efficient, reliable, and impartial forum for administering investment disputes, the ICSID contributes to fostering cross-border investments and global economic development, even if indirectly. Investors are more likely to invest in a foreign country when they know their rights in an investment transaction will be recognized and protected should a dispute with a host government arise. In the past, investors had to resort to diplomatic protection from their home countries when a dispute with a host government occurred. However, now, they can redress their grievances by suing a host government for compensation before an international arbitral tribunal.

EKATERINA LONG has a J.D. from the Southern Methodist University Dedman School of Law, where she served as a senior articles editor on the SMU Science and Technology Law Review. Before law school, Ekaterina graduated *Summa Cum Laude* and Phi Beta Kappa with a bachelor's degree in English and a minor concentration in Business from the University of Dallas. Her practice focuses on business litigation and international arbitration. She practices at Ferguson Braswell Fraser Kubasta PC in Plano.

INSTITUTE FOR TRANSNATIONAL ARBITRATION
OF
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The Institute for Transnational Arbitration (ITA) provides advanced, continuing education for lawyers, judges and other professionals concerned with transnational arbitration of commercial and investment disputes. Through its programs, scholarly publications and membership activities, ITA has become an important global forum on contemporary issues in the field of transnational arbitration. The Institute's record of educational achievements has been aided by the support of many of the world's leading companies, lawyers and arbitration professionals. Membership in the Institute for Transnational Arbitration is available to corporations, law firms, professional and educational organizations, government agencies and individuals.

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II. WHY BECOME A MEMBER?

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Advisory Board members also have the opportunity to participate in the work of

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