Introduction to ICSID and ICSID Arbitration Process

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Jerusalem, Israel
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Introduction to ICSID

• ICSID is 1 of 5 WBG institutions – only “non-financial” arm

• Established in 1966 under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention)

• Promotes foreign investment by providing a multilaterally-agreed system for dispute settlement

• Provides the institutional facility and procedural rules for independent conciliation commissions and arbitral tribunals to decide cases

• Offers technical assistance and training to States and public

• Has administered the majority (over 70%) of all known investment disputes
## Structure of ICSID

### ADMINISTRATIVE COUNCIL
- One representative of each Member State
- One vote per State
- Chairman is President of the World Bank (no vote)

### FUNCTIONS
- Adopt ICSID arbitration and conciliation rules
- Adopt annual budget and approve annual report
- Select SG and DSG(s)
- Designate persons to Panels of Arbitrators and Conciliators

### SECRETARIAT
- Secretary-General
- Deputy Secretaries-General
- Staff (70 people)

### FUNCTIONS
- Support proceedings
- Training and technical assistance
- Publications

See Annex 2 – *ICSID in the World Bank Group*
Mandate of ICSID

- ICSID offers facilities and procedures to resolve investment disputes between States and foreign investors.

- Availability of ICSID contributes to:
  - attracting and retaining private investment
  - creating stable investment climates
  - rules-based international trade and investment
International Membership: 153 States

See Annex 3 – List of ICSID Member States (ICSID/3)
Israel as an ICSID Member State

• ICSID Convention entered into force for Israel on July 22, 1983
  o Signed on June 16, 1980
  o Deposited instrument of ratification on June 22, 1983

• 3 cases initiated by Israeli investors – all concluded

• No cases brought against Israel to date

<table>
<thead>
<tr>
<th>Case No.</th>
<th>Claimant(s)</th>
<th>Respondent(s)</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>ARB/10/3</td>
<td>Metal-Tech Ltd.</td>
<td>Republic of Uzbekistan</td>
<td>Concluded</td>
</tr>
<tr>
<td>ARB/07/15</td>
<td>Ron Fuchs</td>
<td>Georgia</td>
<td>Concluded</td>
</tr>
<tr>
<td>ARB/06/5</td>
<td>Phoenix Action Ltd.</td>
<td>Czech Republic</td>
<td>Concluded</td>
</tr>
</tbody>
</table>
Special Features of ICSID

• Impartial and delocalized facility
• Cost-effective fee structure
• Only institution that can administer ISDS under the three main set of rules (ICSID Convention, ICSID Additional Facility and UNCITRAL)
• Full-time Secretariat with experienced legal counsel and support team
• ICSID is the ISDS Court Secretariat under CETA
• Access to hearing facilities internationally
ICSID Convention & Rules

- **ICSID Convention** – the treaty between States (pp. 9-33)
- **Administrative & Financial Regulations** – costs of cases & role of the Centre (pp. 53-71)
- **Institution Rules** – how to initiate a case (pp. 75-79)
- **Arbitration Rules** – procedure after case is registered (pp. 101-128)

*See Annex 4 – ICSID Convention, Regulations and Rules*
ICSID Caseload
Cases Registered – December 31, 2017

ICSID Arbitration: 583
ICSID (AF) Arbitration: 57
ICSID Conciliation: 8
ICSID (AF) Conciliation: 2

See Annex 5 – ICSID Caseload Statistics Issue 2018-1
Global Context - Growth in FDI & IIAs

Sources: UNCTAD, FDI database (www.unctad.org/fdistatistics) & IIA database (http://investmentpolicyhub.unctad.org/IIA)
Proceedings

**Convention**
Both disputing parties from ICSID Member States
- Conciliation
- Arbitration

**Additional Facility**
One disputing party from Member States
- Conciliation
- Arbitration
- Fact-finding

**Other**
Need not be from Member State
- Case administration under other Rules or Treaties (e.g.: UNCITRAL or other investment cases; FTA & State-to-State cases)
- Other functions on consent of parties (e.g.: Appointing Authority, Mediation, Registry)
- Acting as Secretariat for Regional Trade Agreements (e.g.: CETA; EU-Singapore)

(Source: ICSID, 2018)
Conditions for ICSID Jurisdiction – Art. 25 Convention

• Legal Dispute
• Arising Directly out of an Investment
• Between a Member State, and
• A National of Another Member State

Sources of Consent:
• Contracts
• Investment laws
• Bilateral investment treaties
• Multilateral agreements
Investment: Objective Criteria

An investment has certain inherent features:

1. Contribution (in money or assets) made by investor
2. Duration of the activities / performance
3. Participation in the risk of the transaction
4. Regularity of profits expected
5. Contribution to the economic development of the Host State
Sources of Consent

- Bilateral Investment Treaty: 60.6%
- Investment Contract between the Investor and the Host-State: 16%
- Dominican Republic-United States-Central America Free Trade Agreement: 0.8%
- Investment Law of the Host-State: 9.2%
- North American Free Trade Agreement: 2.8%
- Energy Charter Treaty: 9.3%
- Other Treaties*: 1.3%

(Source: ICSID, 2018)
Conduct of an ICSID Arbitration

See Annex 9 – Detailed Flow Chart
The Request for Arbitration – Institution Rules

• Filed by the Claimant – usually the investor; could be the State (or in some circumstances, a subdivision or agency of a State)

• Claimant pays a non-refundable lodging fee of 25,000 USD – helps prevent frivolous claims

• ICSID reviews the request in light of the Convention and the instrument of consent

• The request is registered unless it is “manifestly outside the jurisdiction of the Centre” (Article 36(3) ICSID Convention)

See Annex 10 – How to file a Request for Arbitration
Constitution of the Tribunal - Process

Step 1 (HOW)
• Determine the **number** of arbitrators and the **method** of their appointment

Step 2 (WHO)
• **Selection and appointment** of Tribunal members

Step 3 (FINAL STEPS)
• **Acceptance** of appointment and **constitution** of the Tribunal
Tribunal Selection and Appointment

- Parties can select anyone who meets qualifications in Article 14:
  - High moral character
  - Recognized competence
  - Independent judgment

Nationality:
(Art. 39, Rule 1(3))

- Majority shall be nationals of States other than the State party to dispute and the State of investors’ nationality (unless parties otherwise agree)

See video – What Makes a Good Arbitrator?
See videos - List of Arbitrator Videos
Selection of Arbitrators

- Parties often consider:
  - Experience
  - Applicable Law
  - Language
  - Availability
  - Reputation
Nationality of Arbitrators - Article 39 of the ICSID Convention

Example: If an Israeli investor filed a request for arbitration against China

• Cannot have:
  - 2 Israeli arbitrators
  - 2 Chinese arbitrators
  - 1 Israeli & 1 Chinese arbitrator …unless parties agree

• Can have:
  - 2 or 3 arbitrators of any nationality other than Israeli or Chinese
  - Usually have 3 different nationalities
Appointment by Chairman – Convention Article 38

• If no appointment in 90 days a party can ask Chairman to appoint the missing arbitrator

• Process: ballot of 5 persons sent to parties – if no consensus, Chairman appoints

• Chairman must appoint from ICSID Panel of Arbitrators (Panel consists of 4 persons designated by each State and 10 persons by Chairman)

See Annex 12– Panel of Arbitrators (ICSID 10)
See Annex 13– Sample Ballot
ICSID Panel of Arbitrators

- Each Member State may designate 4 persons to the Panel
- The Chairman may designate 10 persons to the Panel
- Panel members serve for renewable, 6 year terms

<table>
<thead>
<tr>
<th>Panel</th>
<th>Name &amp; Title</th>
<th>End of Term</th>
</tr>
</thead>
</table>
| CA    | Mr. Yoel BARIS  
Deputy Legal Advisor, Ministry of Finance | Nov 12, 2014 |
| CA    | Prof. Moshe HIRSCH  
Director, Forum of International Law  
Hebrew University of Jerusalem | Nov 12, 2014 |
| CA    | Ms. Deborah MILSTEIN  
Advisor, Office of the Legal Advisor  
Ministry of Industry, Trade and Labor | Nov 12, 2014 |
| CA    | Prof. Arie REICH  
Dean and Professor, Faculty of Law  
Bar Ilan University | Nov 12, 2014 |
Acceptance of Appointment & Declaration – Constitution of the Tribunal

• ICSID seeks acceptance from appointees (Arbitration Rule 5(2))

• Declaration of Arbitrator (Arbitration Rule 6):
  o To keep information confidential
  o To judge fairly as between the parties
  o Statement of relationship with parties or other circumstance if needed
  o Continuing obligation to disclose any such relationship or circumstance that arises subsequently

See Annex 14 – Declaration – Arb. Rule 6(2)
Commencement of Arbitration

ICSID notifies parties of arbitrators’ acceptance

- Tribunal is constituted and proceeding begins

Once Tribunal is constituted:

- First advance payment
- First Session held within 60 days
- 30-day limit to file Preliminary Objection under Rule 41(5)
First Session of the Tribunal – Practical Considerations

To be held within 60 days from Tribunal constitution (unless otherwise agreed)

Date fixed by Tribunal in consultation with the parties and Secretary-General

Held in any venue agreed by parties – (Washington, D.C. as default)

ICSID encourages parties to consider video or teleconference to reduce costs
First Session – Procedural Matters

• Parties are provided a draft agenda and draft Procedural Order No. 1 for comments ahead of the session

• Main items discussed include:
  o Applicable arbitration rules
  o Procedural language(s)
  o Place of proceedings
  o Procedural calendar
  o Written and oral pleadings
  o Public access to documents and hearings
Other Procedures

- Disqualification
- Expedited Preliminary Objections
- Preliminary Objections
- Bifurcation
- Provisional Measures
- Production of Documents
- Non-disputing Parties
Written Pleadings

• Normally two rounds of pleadings:
  ➔ Claimant’s Memorial
  ➔ Respondent’s Counter-memorial
  ➔ Claimant’s Reply
  ➔ Respondent’s Rejoinder

• Same structure for jurisdiction, merits and quantum phases
Memorial

- Statement of the relevant facts
- Statement of the law
- Argument
- All evidence a party plans to rely upon:
  - Exhibits
  - Legal Authorities
Transparency

Access to Hearings

Access to Documents

Amicus Curiae
Non-disputing Party Participation – Arb. Rule 37(2)

- Any person or entity that is not a party to the dispute can request to participate and file an *amicus curiae* submission.

- Tribunal discretion to accept the submission based on whether:
  - The submission will assist in determination of a factual or legal issue by bringing a different perspective, particular knowledge or insight.
  - The submission addresses a matter within the scope of the dispute.
  - The non-disputing party has a significant interest in the proceeding.
The Hearing

- Opening by moving party
- Opening by responding party
- Moving party leads its witnesses
- Responding party leads its witnesses
- Examination of witnesses and experts:
  - Direct
  - Cross
  - Re-direct
- Closing by moving party
- Closing by responding party
## Discontinuance of the Proceeding

<table>
<thead>
<tr>
<th>Rule/Matter</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Arbitration Rule 43</strong></td>
<td>• On settlement or agreement on discontinuance by the parties</td>
</tr>
<tr>
<td><strong>Arbitration Rule 44</strong></td>
<td>• On request of a party if there is no objection by the other party</td>
</tr>
<tr>
<td><strong>Arbitration Rule 45</strong></td>
<td>• For failure of the parties to act</td>
</tr>
<tr>
<td><strong>Regulation 14(3)(d) and (e)</strong></td>
<td>• For failure of the parties to pay advances</td>
</tr>
</tbody>
</table>
The Award

Relevant Provisions

- ICSID Convention
  Article 48
- ICSID Arbitration Rules
  46-48
Awards

Three possible types:

- Award declining jurisdiction
- Award on the merits
- Embody settlement of parties

No partial award in the ICSID system
Special Features of ICSID Convention Awards

• Awards are final and binding
• Annulment – no appeal in local courts
• Member States must recognize monetary awards without further process
• Monetary award enforceable as a final judgment in any Contracting State
Outcomes in ICSID Cases – December 31, 2017

Dispute decided by Tribunal (66%)

- Award dismissing all claims (17.2%)
- Award declining jurisdiction (16.6%)
- Award upholding claims in part or in full (31.1%)
- Dispute settled or proceeding otherwise discontinued (34%)
  - Proceeding discontinued at the request of both parties (16.1%)
  - Proceeding discontinued at the request of one party (9.2%)
  - Settlement agreement embodied in an award at parties’ request (4.9%)
  - Proceeding discontinued at the initiative of the Tribunal (0.2%)
  - Proceeding discontinued for lack of payment of the required advances (2.9%)
  - Proceeding discontinued for failure of parties to act (1.1%)
  - Award deciding that the claims are manifestly without legal merit (0.7%)
Costs of Arbitration - 3 Components

Parties’ expenses
- Cost of legal representation
- Witnesses
- Experts
- Any other cost relating to the presentation of a party’s case

Arbitrators’ Fees and expenses
- 3,000 USD per day ($375/hour)
- Plus:
  - Direct expenses reasonably incurred, travel expenses and subsistence allowance (when traveling)

Centre’s administrative charges
- 42,000 USD/yearly usually shared by parties (21,000 USD each)
- Includes:
  - Hearing facilities at the World Bank, services of the Tribunal Secretary and case team, and financial administration

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ICSID System is Self-Contained

• No domestic court review of decisions or awards
• Post-award remedies under the ICSID Convention:

- Article 49(2): Rectification/Supplementary Decision
- Article 50: Interpretation
- Article 51: Revision
- Article 52: Annulment
# Annulment

## Article 52 of the ICSID Convention

<table>
<thead>
<tr>
<th>When?</th>
<th>5 grounds for annulment, Article 52(1)(a) to (e)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Time limits</td>
<td>120 days after the award is rendered</td>
</tr>
<tr>
<td></td>
<td>In case of corruption of a Tribunal member, 120 days after discovery and within 3 years of award</td>
</tr>
<tr>
<td>Who decides?</td>
<td>Ad hoc Committee of 3 members appointed from Panel of Arbitrators</td>
</tr>
<tr>
<td>Stay of enforcement</td>
<td>Stay of enforcement may be granted during proceeding</td>
</tr>
<tr>
<td>Decision</td>
<td>Decision on annulment can annul award in full or in part</td>
</tr>
</tbody>
</table>

*See Annex 28 – List of Decisions on Annulment*
Annulment - Grounds

• The Tribunal was not properly constituted
• The Tribunal has manifestly exceeded its powers
• Corruption on the part of a Tribunal member
• A serious departure from a fundamental rule of procedure
• The award fails to state the reasons on which it is based
Annulment is not Appeal

Article 53 of the ICSID Convention

• Limited & extraordinary remedy
• Maintains integrity of the process
• Can annul the original award in its entirety or in part
• Either party may resubmit the dispute to a new Tribunal

See Annex 29 – 2016 Background Paper on Annulment for the Administrative Council of ICSID
Annulment Outcomes – December 31, 2017

- Number of Convention awards rendered
- Number of decisions rejecting the application for annulment
- Number of decisions annulling the award in part or in full
- Number of annulment proceedings discontinued
Recognition and Enforcement of Awards

Articles 53 and 54 of the ICSID Convention

- ICSID Awards are binding and parties must comply with them
- Awards are treated as final judgments of national courts of Member States
- Pecuniary obligations can be enforced in any Member State
- National courts proceed on the basis of a certified copy of the award and cannot review the award
- Limitation: Rules on State immunity from execution apply

*c.f. Annex 7 – Measures Taken by States (ICSID/8)*
## Existing Recognition and Enforcement Mechanisms in ISDS

<table>
<thead>
<tr>
<th>ICSID Convention – Simplified Mechanism</th>
<th>Non-ICSID Convention – Separate Recognition &amp; Enforcement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Simplified recognition and enforcement mechanism:</td>
<td>Separate recognition and enforcement:</td>
</tr>
<tr>
<td>• No review of the award by domestic courts</td>
<td>• Under domestic law based on the UNCITRAL Model Law</td>
</tr>
<tr>
<td>• Obligation to enforce pecuniary obligations upon presentation of certified award</td>
<td>• Under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards</td>
</tr>
</tbody>
</table>
Compliance with ICSID Awards

• Compliance is important to maintain confidence in the process
• Could be considered by providers of political risk insurance
• Non-compliance is a breach of ICSID Convention and could lead to a State-to-State dispute for treaty violation before the ICJ
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