

ICSID arbitration in the Americas



Jean E Kalicki
Arnold & Porter LLP

The past two decades have seen a virtual explosion in investor–state arbitrations before ICSID, the World Bank’s International Centre for Settlement of Investment Disputes. From only 20 cases filed in ICSID’s first 20 years (1966 to 1985), ICSID’s caseload grew to almost 180 cases filed in the next 20 years (1986 to 2005). There have been 107 new ICSID cases filed in the past five years alone and at least 15 lodged thus far in 2006. Overall, ICSID now has resolved 110 investor–state cases, and another 105 are presently pending before arbitral tribunals.

These cases present a unique profile in the world of international arbitration. Before entry into force in 1966 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), complaints by investors against foreign sovereigns generally could only be presented in the home courts of those sovereign states, or in international proceedings initiated by the investors’ own states, if they chose to extend diplomatic protection to their nationals’ claims. Neither option proved particularly attractive. Investors were generally limited in local courts to claims based on contract or on specific provisions of local law, and even in these cases they had serious doubts about the neutrality of host state courts in actions against sovereigns or sovereign entities, and about their ability to enforce any monetary judgments they might obtain. Investors had other concerns about diplomatic protection, among them the uncertainty of obtaining home state espousal of their claims and loss of control of those claims even if espoused, as well as the general prerequisite that investors first exhaust local remedies before seeking diplomatic protection and the lack of any recognised enforcement remedies in state-to-state proceedings even in the event of favourable judgments. The resulting lack of legal security was perceived as chilling foreign investment in countries that otherwise could benefit from inward capital flows in the quest for greater development.

The ICSID Convention was designed to introduce a revolutionary new process in which states could attract greater investment by consenting to afford investors certain standards of treatment recognised by international law, and by agreeing in advance that investors could present claims for perceived violations directly before neutral international arbitrators, without the need for their own states’ espousal and protection. Some 143 states have now ratified the convention, which obliges them to enforce ICSID awards as if they were final judgments of their own highest courts, without even the grounds for refusing enforcement pursuant to the provisions of the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, for purely commercial arbitrations.

The growing use of ICSID arbitration is evidence of the attractiveness of this ‘direct claims’ system, at least to investors. Some of the 215 cases that have been presented to ICSID thus far arise from concession contracts with state entities, which provide recourse to ICSID for breach of contract, and a few concern host state investment legislation that consents to investor submission of claims to ICSID. But the vast majority of claims before ICSID concern challenges to regulatory or administrative acts independent of contractual relations, such as revocation of permits or imposition of

onerous operating conditions that are inconsistent with local law or due process requirements or are targeted specifically at, or disproportionately impact, one or more foreign investor. These claims generally arise under bilateral investment treaties, which articulate baseline standards for treatment of foreign investment and which guarantee direct access for investors to neutral forums for resolution of their claims, independent of even purportedly ‘exclusive’ forum selection clauses in applicable contracts. The substantive standards of these treaties vary, but most contain guarantees for investors of ‘fair and equitable treatment’, nondiscriminatory and ‘most favoured nation’ treatment, ‘full protection and security’, free transfer of currency, and prohibitions on expropriation without compensation. Under recognised international principles of state responsibility, these claims can be brought against sovereigns even for the acts of provincial or municipal authorities or for those of particular state ministries or agencies. There are now more than 2,200 bilateral investment treaties in force, and more are being negotiated.

A significant proportion of the total ICSID caseload – 15 per cent of the concluded matters and 49 per cent of the pending matters – has concerned claims against states in the Americas. None of the cases filed during ICSID’s first 30 years was against a Latin American sovereign, but since 1996 there have been 40 cases filed against Argentina, seven against Ecuador, six against Venezuela, four against Peru, three against Chile, two against Bolivia, and one each against Costa Rica, El Salvador, Honduras, Nicaragua and Paraguay. (Brazil has never consented to using the ICSID framework for disputes with foreign investors, and Mexico has consented only for NAFTA claims by US or Canadian investors, as discussed below.) In most of these cases, the claimants have been investors from industrialised nations in Europe or the United States. But recently there has been movement towards ICSID being used also by Latin American investors in other Latin American countries, such as by Chilean investors against the Republics of Peru and Bolivia and by a Peruvian investor against the Republic of Paraguay. Because ICSID’s Additional Facility serves as one possible venue for arbitration proceedings under NAFTA, ICSID has also been host to some 15 NAFTA claims, including 12 against Mexico and three against the United States.

Many of these cases have concerned threshold challenges to ICSID’s jurisdiction. Although many different objections have been presented, the principal areas of challenge to date have concerned claims that investors either did not qualify to invoke applicable investment treaties by virtue of third-party (or even host state nationals’) ownership or control of the claimant entity, or that investors were restricted to local forums by contractual dispute resolution clauses or ‘fork in the road’ provisions of applicable treaties. Most of these objections have not ultimately proved to be an obstacle to ICSID’s retaining the case. ICSID tribunals have found claimants to have standing so long as either they, or an entity they directly or indirectly control or in which they own a significant shareholding stake, are incorporated in a state that is party to an investment treaty with the respondent state. Tribunals have also drawn a sharp distinction between contractual or administrative

claims and treaty claims, and rejected arguments that pursuit of the former in host state courts or administrative tribunals, or forum selection clauses obligating such pursuit, bar access to ICSID for treaty claims notwithstanding similar factual underpinnings. ICSID tribunals have also proved willing to overlook procedural requirements in some treaties, such as Argentine treaties mandating that investors submit disputes to the local courts 18 months before filing claims at ICSID, on the grounds that 'most favoured nation' clauses in the same treaties allow investors to invoke other Argentine treaties that omit such procedural prerequisites.

The substantial wave of Argentine cases, arising out of that country's economic crisis of 2001 and its resulting currency devaluation and decrees for mandatory foreign currency conversion, also tested challenges to ICSID's power to hear private claims with respect to policies adopted by states in the exercise of fundamental sovereign objectives. Argentina initially argued that since its constitution subordinated international treaties to overarching public law principles, its consent to ICSID did not encompass review of sovereign decisions to safeguard essential public interests, such as restructuring and stabilising the national currency system, but was limited to disputes of a purely commercial nature. This approach, which asserted sovereign independence from the judgment of international arbitral tribunals on critical policy issues, caused some observers to draw analogies to the earlier Calvo Doctrine, under which states in Latin America insisted that jurisdiction over investor grievances existed only in host state courts. But the cases that have considered these objections thus far have not accepted this view, with ICSID tribunals affirming their full jurisdiction based on the underlying bilateral investment treaties.

As a result of these initial rulings, which make it highly likely that the remaining claims against Argentina may proceed to full merits examination, the Argentine government has reconsidered its earlier full frontal attack on the appropriateness of ICSID review.

Instead, Argentina has signalled a new policy of actively seeking to renegotiate concession contracts with aggrieved investors, as a way of resolving pending disputes and returning the focus to expanding business opportunities in Argentina. In the past year, investors have withdrawn several high profile ICSID claims against Argentina as a result of concession renegotiations. Other claims are nonetheless proceeding, with the first award against Argentina on the merits issued in 2005. It remains to be seen whether Argentina will generally agree to abide by adverse rulings on the merits or seek to resist them, either by annulment proceedings before ICSID itself or by simple non-payment of awards, which is rare in the ICSID process given the convention's mandatory enforcement provisions and the overarching imprimatur provided to the system by the World Bank.

Recent events in Latin America, such as Bolivia's nationalisation of the gas industry and Venezuela's moves to exert more control over foreign oil companies operating in its territory, suggest possible new waves of ICSID cases against these countries. It is not yet clear what the practical consequences will be of Venezuela's recent effort to forestall international claims, by declaring that arbitration clauses in existing oil concession contracts will not be accepted and that companies invoking such clauses will be excluded from further investment opportunities. Such strong-arm tactics may dissuade investors for a time from challenging state measures that impair certain rights, but if those measures reach levels where they are crippling investors' ability to do business in the country, one can expect ICSID claims to flourish nonetheless.

Sovereign states should not, however, view the ICSID system as inevitably stacked against them. Several recent decisions by ICSID tribunals have underscored that sovereigns have powerful tools available, when guided by sophisticated counsel, to obtain dismissal of ICSID claims even at the jurisdictional stage. In one recent case, El Salvador was successful in convincing an ICSID tribunal to dis-

Arnold & Porter LLP

555 Twelfth St, NW
Washington, DC 20004
Tel: +1 202 942 5000
Fax: +1 202 942 5999
Website: www.arnoldporter.com

Contact:
Whitney Debevoise
whitney_debevoise@aporter.com

Jean Kalicki
jean_kalicki@aporter.com

Arnold & Porter LLP is an international law firm with an in-depth understanding of the changing business environment as it intersects with law, public policy, and business. With approximately 625 lawyers handling disputes and transactions all over the world, the firm brings a valuable perspective and proven track record of experience in cross-border regulation, litigation, and transactional law. Arnold & Porter maintains offices in Washington, New York, London, Brussels, Los Angeles, San Francisco, Northern Virginia and Denver, and has a network of relationships with law firms throughout the world.

Arnold & Porter has been involved for many years in a wide range of international arbitration projects for US and international clients, including advising at the time of transactional agreements on drafting appropriate arbitration clauses; assisting with informal as well as institutional mediation of disputes; and participating extensively in arbitration proceedings. Arnold & Porter attorneys regularly serve as advisers, advocates and arbitrators in economic disputes between sovereign governments and private investors, including disputes arising out of concession agreements and other state contracts or under the terms of bilateral investment treaties. The firm is equally active in private commercial arbitrations arising out of international transactions. Arnold & Porter has also assisted clients in arbitral award enforcement and execution proceedings for clients in the United States and abroad.

In investor-state arbitration, Arnold & Porter attorneys have extensive experience in matters arbitrated before the World Bank's International Centre for Settlement of Investment Disputes (ICSID) and before ad hoc panels proceeding under the UNCITRAL Rules, which involve complex issues of arbitral jurisdiction, state responsibility and the interaction of national and international law. At ICSID, Arnold & Porter attorneys have represented the Republics of Hungary, El Salvador, Panama, Venezuela and Argentina, and represented Italian, Chilean, and American investors in disputes with the United Arab Emirates, Peru, Bolivia and Costa Rica. Arnold & Porter has also advised sovereign governments on revisions to their national legislation to facilitate the enforcement of arbitration agreements and awards and with respect to the negotiation of bilateral investment treaties and the investment chapters of free trade agreements.

Arnold & Porter attorneys have represented private parties in a wide range of commercial arbitrations arising out of transactions in the United States, Europe, the Middle East and Latin America. The firm's attorneys have appeared before arbitral tribunals administered by the ICC, AAA, ICDR and LCIA, in ad hoc arbitrations under the UNCITRAL and IACAC rules, and in arbitral award enforcement and execution proceedings for clients in the United States and abroad.

The firm's attorneys have served other prominent roles in the arbitration community, including as arbitrators before ICSID, the ICC, the AAA and other institutions; as chair or members of Bar Committees on international arbitration; as organisers, moderators or speakers at international conferences; and as members of task forces organised to consider reforms in the arbitral rules or procedures of leading institutions. Our attorneys have taught courses on international arbitration at leading law schools and have published articles on this and related topics.

miss all claims brought by a European investor, on the ground that the investor had obtained its rights under a state concession contract through serious fraud in a public bidding process, thereby excluding the investment from protection under so-called ‘in accordance with law’ clauses in the applicable treaty. In another recent decision, a sovereign state obtained a full jurisdictional dismissal of claims brought by a European telecommunications provider, on the grounds that the applicable treaty limited ICSID jurisdiction to conduct constituting expropriation and the sovereign’s regulatory actions did not cross this threshold requirement as a matter of international law. In both cases, the investor was ordered to repay the sovereign for some or all of its legal and arbitration costs, a result that previously had been less common in the ICSID context than in the world of pure commercial arbitration.

Even in cases where jurisdictional objections are not sustained, sovereigns have had success on the merits, both in defending claims on substantive grounds and in limiting damage exposure to acceptable levels. Paraguay defeated ICSID claims arising out of the bankruptcy of a Paraguayan financial institution, demonstrating that its supervision of the bank’s activities had not fallen below the standards required by the applicable treaty and that the claimant’s loss of deposits did not amount to expropriation of his investment. Other sovereign states have defeated ICSID claims based on alleged interference with investments by local administrative authorities or regulatory agencies, on the basis that such interference did not rise to the level of an international treaty violation, and ICSID’s function was not to serve as an administrative review body short of such egregious violations. In another sort of victory, Venezuela was found to have infringed investor rights by dispensing with a previously negotiated concession for an airport toll road, due to massive public protests, but convinced an ICSID tribunal to limit the damages award to only a fraction of the massive lost profit figure the investor initially had sought. And in October 2006, an ICSID tribunal accepted Argentina’s ‘state of necessity’ defence to exempt it from a

duty to compensate certain US investors for damages suffered from adjustment of tariffs during a 17-month period between December 2001 and April 2003, but found Argentina still liable for damages related to treaty violations occurring outside of that window.

These results do not mean, however, that sovereigns should be complacent about ICSID arbitration. The ICSID process still provides a powerful tool for investors in appropriate cases to vindicate their treaty-given rights to internationally recognised standards of treatment. Companies that are undertaking significant investment in other countries need experienced counsel to guide them in structuring their transactions, to ensure that the investment is channelled through entities that would qualify as ‘nationals’ under applicable investment treaties. They also need advice as business disputes are emerging, in order to ensure that their initial efforts at resolving the disputes do not complicate or forestall later access to ICSID, and instead are framed in such a way as to expedite ultimate access to ICSID should negotiations fail. Finally, investors determined to proceed with claims at ICSID need sophisticated counsel to help them properly frame those claims from the outset and throughout the proceedings, so as to maximise the possibility of future success. Not all disputes may be framed as treaty violations, and not all contractual or financial interests may qualify as covered investments for ICSID purposes. ICSID arbitration is a specialised field requiring knowledge not merely of the institution’s unique procedures and rules, but also of evolving trends in public international law and in the emerging jurisprudence particular to investor–state arbitration itself.

Whether the ICSID system is approached from the perspective of a sovereign state or from that of an investor, one thing is clear: ICSID arbitration is becoming the dominant vehicle for resolving claims that arise between these entities, and is likely to play an even more critical role in investor–state relations as more parties become aware of the opportunities for neutral dispute resolution that investment treaties present.