E.ISSN: 2661-7404 Academic Journal of Legal and Political Researchs P.ISSN:2571-9971
Year: 2020 Vol : 04 No : 01

The growing number of disputes resolved under The International Centre for Settlement of Investment Disputes (ICSID) rules, has contributed to consider the ICSID as a widely established legal system for the protection of foreign investment."

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Send Article Date: 2020-01-24 Date of acceptante of the article 2020-02-29

Abstract:

Globalization with the progressive acceptance and implementation of the economic principle of free trade has been undoubtedly, one of the most important features of the 20th century. This context led to the growing development of foreign investments, particularly since the second part of the last century, usually between investors of developed countries, and developing States which frequently considered foreign investment as a synonym of economic development.

Nevertheless, these investments regularly related to major infrastructure projects and the exploitation of natural resources, were often affected by political instability, along with changes of governments and their respective political directions.

system –protection –foreign– investment– disputes

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الملخص

العولمة مع القبول والتطبيق التدريجي للمبدأ الاقتصادي للتجارة الحرة بلا شك احد اهم سمات القرن العشرين. ادى ذلك السياق الى تنمية الاستثمارات الاجنبية المتزايدة, خاصة في النصف الثاني من القرن الماضي. عادةً بين مستثمري البلدان المتقدمة والدول النامية التي كثيراً ما تعتبر الاستثمار الاجنبي مرادفاً للتنمية الاقتصادية ومع ذلك فإن هذه الاستثمارات ترتبط بانتظام بمشاريع البنية التحتية الكبرى واستغلال الموارد الطبيعية, وغالبا ما تتأثر تلك الدول بعدم الاستقرار السياسي جنبا الى جنب مع تغييرات الحكومات والتوجهات السياسية لكل منها.

تاريخيا عندما ينشأ نزاع بين مستثمر اجنبي والدولة المضيفة لم تكن هناك امكانية متاحة لمقاضاة تلك الدولة على المستوى الدولي. حيث كان للمستثمر الاختيار بين خيارين: الاول, الذهاب الى المحاكم القضائية في الدولة المضيفة. والثاني, طلب الحماية الدبلوماسية لدولته. وهكذا, من ناحية, ان المستثمر يواجه خطر ان يرى المحكمة معادية لتحميل دولتها المسؤولية عن خرق العقد او الالتزام الدولي. ومن ناحية اخرى, الاعتبارات السياسية التي تتدخل دائما في قرار الدولة في تبني مطالبة مواطنها ام لا, مما يؤدي في بعض الاحيان الى تأخير خطير يتعذر علاجه.

هذه الورقة سوف تدرس الميزات ونقاط القوة لنظام ICSID. وستنتقل بعد ذلك الى النظر في إنفاذ أو إلغاء قرار صادر بموجب اتفاقية ICSID وقواعد التحكيم الخاصة بها. ايضا سوف ندرس خصوصية نظام ICSIDبشأن الاعتراف بقرارات التحكيم الصادرة بموجبه و إنفاذها وقاعدة التقييد بشأن حصانة الدولة. أخيرا سننظر في غياب حق الاستئناف بشأن استحقاق القرار والاسباب المحدودة التي يمكن بموجبها التقدم بطلب لالغاء القرار وفقا للمادة ٥٢ من اتفاقية ICSID.

الكلمات المفتاحية: نظام الحماية – نزاعات الاستثمار

Introduction:

Historically, when a dispute between a foreign investor, individual or corporation, and a host State arose, whether directly from a contract or not, there was no available possibility to sue a State at the international level. The investor had the choice between two options: going to the judicial courts of the Host State or asking for diplomatic protection to its own State. Thus, on one hand, the investor

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was running the risk to see the court being hostile to hold its own State responsible for a breach of contract or of an international obligation, and, on the other hand, political considerations were always interfering in the decision of the State to espouse the claim of its national or not, sometimes creating serious and irreparable delays.

Progressively, States began to realize that it was necessary, in order to attract foreign investors, to create a favourable climate for investment, and did so through the negotiation of bilateral treaties for the protection of international investments, also known as Bilateral Investment Treaty (BIT's). These instruments provide for a legal framework in the international investment field and usually incorporate clauses for the submission of international investment disputes to arbitration.

It is in this context that the International Centre for the Settlement of Investment Disputes was created by the 1965 Washington Convention on The Settlement of Investment Disputes between States and National of Other States that entered into force on 14 October 1966 and has currently 147 Contracting States. The main purpose of the Centre was to establish an impartial international forum providing facilities for conciliation or arbitration procedures by implementing the provisions of the ICSID Convention.

Since then, numerous BIT's and multilateral agreements, such as the Energy Charter Treaty and the NAFTA treaty have expressly mentioned the ICSID Convention in their provisions for the settlement of disputes.

The progressive implementation of investment legislations in many countries, along with the multiplication of BIT's since the 90's and a growing number of disputes resolved under ICSID rules, have contributed to consider ICSID as a widely established legal system for the protection of foreign investment.

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Conforming to Lauterpacht's assertion: "For the first time a system was initiated under which non State entities–corporations or individuals could sue States directly; in which State immunity was much restricted; under which international law could be applied directly to the relationship between the investor and the host State; in which the operation of the local remedies rule was excluded; and in which the tribunal's award would be directly enforceable within the territories of the State's parties".[1]

This document will examine in this paper the main features and strengths of the ICSID system in accordance with this statement.

It will firstly look at some trends followed by the "international investment community" (States and foreign investors) which have confirmed the ICSID regime as an adequate and recognized system, not only for the resolution of legal investment disputes, but also as a guarantee that the investment protections found in treaties (particularly BIT's) and direct agreements between the host State and the investor can be preserved by an efficient arbitration system.

It will then move on to consider the enforcement and annulment of an award rendered pursuant to the ICSID Convention and its Arbitration Rules. We will study the specificity of the ICSID regime on the recognition and enforcement of awards rendered pursuant to the ICSID Convention and the restrictive doctrine on State immunity. Finally, we will look at the absence of any appeal on the merits of an ICSID award, and the limited grounds under which it is possible to apply for the annulment of an award according to the article 52 of the ICISID Convention.

[1] Lauterpacht, in his forward to Schreuer, The ICSID Convention A Commentary (2001), X1- X11

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I THE MAIN FEATURES OF THE ICSID REGIME AND SOME RECENT DEVELOPMENTS IN THE INTERNATIONAL INVESTMENT LAW FIELD:

A) ICSID scope of jurisdiction:

According to Article 25.1 of the ICSID Convention: "the jurisdiction of the Center shall extend to any legal dispute arising out of an investment, between a Contracting State (…) and a national of another Contracting State." [2]

While the meaning of "national of another Contracting State" is expressly settled in article 25.2, the Convention does not give any definition of investment; this one will have to be found in the adequate treaty.

According to C.H Schreuer: "In Ceskoslovenska Obchodni Banka AS v. The Slovak Republic, the ICSID Tribunal held that a loan may constitute an investment if it contributes substantially to the economic

[2] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Washington, 18 March 1965.Article 25.1

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development of a State." [3]

In Mitchell v. DR Congo, "the Tribunal had held that the claimant's law office established in the territory of the DRC (…) fell within the meaning of investment as used in the applicable treaty and the Convention."[4]

Thus, it can be said that arbitral Tribunals, not only in these particular disputes but also in others, have given a wide interpretation to the meaning of "investment" to base their jurisdiction on the particular dispute.

A "national of another Contracting State" can include a natural or juridical person with the nationality of one Contracting State other than the State party to the dispute, or a juridical person with the nationality of the Contracting State party to the dispute but that the parties have agreed to treat as a national of another Contracting State because of foreign control. The term "because of foreign control" is usually interpreted by the arbitral tribunals under the circumstances of each case to be given its full meaning and effect.

In Vacuum Salt v. Ghana the Tribunal noted: "that foreign control(…)does not require, or imply any particular percentage of share ownership. Each case arising under that clause must be viewed in its own particular context, on the basis of all the facts and circumstances."[5]

In accordance with some Tribunals and commentators: "Art. 25 (2) (b) of the ICSID Convention accounted for the rather common situation in which a Host government requires foreign investors to channel their investments through a

[3] Redfern and Hunter on International Arbitration, N. Blackaby, C. Partasides, A. Redfern and M. Hunter, Student Version, Oxford University Press, Fifth Edition, page 476 at para 8.26

[4] C.H Schreuer, The ICSID Convention: A Commentary, Cambridge University Press, ed. 2009, page 944 para 159

[5] Vaccum Salt Production Limited v. Government of the Republic of Ghana, ICSID case no. ARB/92/1, 4 ICSID Rep 320 at 346 (1997)

locally incorporated entity".[6] In Redfern and Hunter's opinion: "This enables minority shareholders in the local entity (many of whom may be local investors) to obtain indirect relief through treaty arbitration."[7]

Therefore, we can easily appreciate that ICSID arbitral tribunals have extensively interpreted the notions of "investment" and "foreign national", confirming the wide scope of jurisdiction given by the ICSID Convention to the Center. This can show States and investors that ICSID is an accessible system able to cover a broad range of investment disputes.

B) The consent of the parties to the dispute:

The consent of the parties to arbitration has been described as the cornerstone of the ICSID system. Under art.25 of the Washington Convention, the parties to the dispute, investor and contracting State have to consent in writing to submit their dispute to the Center.

Usually, Host States give their consent in the text of a BIT, while the investors usually express their consent when formulating their claim. Consequently, the State has given its consent to arbitration to an abstract category of investors without considering them individually. Investors themselves do not go to arbitration because of the consideration of the privileged status of the Host State, but because they believe this arbitral procedure, negotiated for them by their own State through BIT's, constitute the best protection of the investment they estimate has been suffering from an unfair treatment.

Therefore, when there is no direct contract between a foreign investor and a host State, thanks to legal instruments such as the ICSID Convention, BIT's and

[6] Julian D. M Lew, ICSID Arbitration: Special Features and Recent Developments, page 272, in N. Horn (ed), Arbitrating Foreign Investment Disputes, 2004, Kluwer Law International

[7] Redfern and Hunter on International Arbitration, N. Blackaby, C. Partasides, A. Redfern and M.Hunter, Student Version, Oxford University Press, Fifth Edition page 473 para 8.20

multilateral agreements, a "separated"[8] consent can be given to arbitration that will allow direct recourse to arbitration for the investor against the host State.

In many BIT's the clause submitting a dispute to arbitration is an irrevocable optional clause, or what has also been called a "fork in the road". Once consent has been given to arbitration, any other remedy is excluded. Although the second part of Article 26 of the ICSID Convention declares that "A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention", the general rule is found in the first part of the article that reads as follows: "Consent (…) shall be deemed consent to such arbitration to the exclusion of any other remedy."[9]

Thus, we can assert that, except in case of an express amendment by a State to the Convention, ICISD generally does establish an exclusion of any local remedy before the submission of the dispute to the ICSID arbitral tribunal, conferring the investor with a direct recourse against the State.

Hence, with a direct recourse to ICSID arbitration and the wide range of disputes that the Center's scope of jurisdiction covers, it is hardly surprising that many corporations (potential foreign investors) have urged their governments to enter into negotiations of BIT's with other States.

C) The spread of BIT's in the foreign investment law field and its relationship with international law:

According to A. Parra: "From the late 1980's and through the 1990's, the pace of BIT-making increased enormously.(…)The proliferation of investment treaties

[8] E. Gaillard uses the French word "dissocié" in E. Gaillard, L'arbitrage sur le Fondement des Traités de Protection des Investissements, Revue de l'Arbitrage 2003 no2 at page 859

[9] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Washington, 18 March 1965. Article 26

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with these references to arbitration under the ICSID Convention and Additional Facility began after the mid-1990's to transform the caseload of ICSID."[10]

This shows quite clearly the relationship between the proliferation of BIT's (as well as multilateral investment treaties) and the use of the ICSID system.

BIT's became one of the most relevant instruments for the international community to develop international investment law. In fact, even if States usually conclude many BIT's with different States, a similar core set of concepts and rules can be found in these instruments. This has led many authors to assert that "BIT's do not, however, exist in a vacuum. They are an integral part of international law (…) What's more, general concepts of international law may be used to infuse particular meanings into the concepts described in the text of a BIT (…)"[11]

"As BIT's are international law instruments, international law is applicable by virtue of the Vienna Convention on the Law of Treaties (…)"[12] Nevertheless art.42.1 states that: "The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute(…) and such rules of international law as may be applicable."[13]

[10] A. Parra, The Development of the Regulations and Rules of the International Center for Settlement of Investment Disputes, ICSID Review-Foreign Investment Journal, 2007, vol 41, page 62

[11] L. Yves Fortier, Expectations of Governments and Investors vs. Practice: A View from the Bench, pages 351-352, ICSID Review-Foreign Investment Law Journal, Volume 24 number 2 (Fall 2009)

[12] Redfern and Hunter on International Arbitration, N. Blackaby, C. Partasides, A. Redfern and M. Hunter, Student Version, Oxford University Press, Fifth Edition, page 484 para 8.48

[13] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Washington, 18 March 1965.Article 42.1

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Therefore, we cannot say that international law is the only applicable law to foreign investment disputes as the law of the Contracting State is still present, but it seems to have been put on the same foot with domestic law in the ICSID Convention(of course after the applicable law agreed by the parties). As described by the Tribunal in CMS v Argentina: "It is no longer the case of one prevailing over the other and excluding it altogether. Rather, both sources have a role to play."[14]

Thus, it is likely that, in the light of a foreign investment dispute brought to the ICSID under a BIT, the Tribunal will have to apply internal rules of the Host State in order to determine whether or not the State is responsible. But, as held in the Vivendi case: "(…)in respect of a claim based upon a substantive provision of that BIT(…)the inquiry which the ICSID tribunal is required to undertake is one governed by the ICSID Convention, by the BIT and by the applicable international law. Such an inquiry is neither in principle determined, nor precluded, by any issue of municipal law". [15]

D) The core set of investment protections found in many BIT's:

As said above, many authors have held that the international community has created an international investment legal regime through the increasing conclusion of BIT's and multilateral treaties on foreign investments protection or treaties related to this purpose, such as the ICSID Convention.

The fact that similar concepts and protections are found in most of the BIT's concluded since the 90's has undoubtedly contributed to this vision. Notions such as "fair and equitable treatment", the "minimum standard of treatment", or "no

[14] CMS Gas Transmission Company v Argentine Republic, Decision on Jurisdiction, ICSID Case No ARB/01/8, 2003 paras 115-116

[15] Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic, Decision on Annulment, ICSID Case No ARB/97/3, 2002 para 102.

expropriation without a prompt, adequate and effective compensation" are located in almost every BIT. We are particularly going to look at a recent trend in investment treaties: the "umbrella" clause and the "MFN" clause.

Through the inclusion of a clause specifying the obligation of the host State to comply with specific investment undertakings (the so-called umbrella clause), many have been wondering whether the legal effect of such a clause was to achieve to elevate any breach of contract to the level of treaty breach.

According to Redfern and Hunter, there have been different approaches adopted by arbitral Tribunals that have been grouped into four schools of thought.

Some have argued that umbrella clauses are functional only when it is the shared intent of the parties to constitute any breach of a contract into a breach of the BIT. See SGS v Pakistan. [16]

A second school will rather admit the operating umbrella clause when the breach of contract is committed by the host State in an exercise of sovereign authority. See El Paso Energy v Argentina.[17]

A third view considers that the umbrella clause can constitute the basis for a treaty claim but without changing the proper law of the contract, so the contractual claim does not become a treaty claim. See SGS v Philippines and CMS v Argentina cases.[18]

[16] SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB 01/13, decision of 6 August 2003

[17] El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15 (US/Argentina BIT). - Award, 31 October 2011

[18] SGS Société Générale de Surveillance v. Republic of the Philippines. ICSID Case N° ARB/02/6, decision of 29 January 2004, and, CMS Gas Transmission Company v. Argentine Republic, ICSID Case No. ARB/01/8, decision of Annulment Committee of 25 September 2007

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Finally there is the opinion that the effect of umbrella clauses is to internationalize the contract by assimilating that a contractual claim in presence of this clause would become a treaty claim subject to treaty rules, as in Fedax v Venezuela.[19]

Hence, with the development of umbrella clauses and if tribunals embrace the two last points of view, it wouldn't be surprising to assist to an increasing number of ICSID cases concerning contractual claims brought by an investor under the BIT umbrella clause. It is not hard to see how these kinds of clauses can achieve to widen the scope of protection of Bilateral Investment Treaties and simultaneously stimulate the investors in the use of the ICSID system.

Another sort of clauses that have been multiplying in BIT's is the so-called MFN clause or the most favoured nation clause. These imply an obligation for the host State to treat a foreign investor in the same way that other foreign investors, that is to say that a foreign investor can have access to more favourable conditions established in another BIT concluded by the host State.

The MFN clause usually applies to substantive treatment standards of BITs, like fair and equitable treatment or guarantees against uncompensated expropriations, but it can also include procedural matters such as the dispute resolution mechanism.

In the Maffezini case, the BIT between Argentina and Spain required recourse to local courts for a period of 18 months before going to international investor-State arbitration while the BIT between Spain and Chile only provided for a period of 6 months of negotiation prior to the access of arbitration. The tribunal held that the Argentinian investor could effectively rely on the BIT between Spain and Chile as a result of the MFN clause in the Argentina-Spain BIT.

[19] Fedax N.V. v. Republic of Venezuela, ICSID Case No. ARB/96/3, decision of 11 July 1997

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"The presence of MFN clauses in investment treaties creates a diffusive effect of investment protection as additional gains obtained by one State flow to other States. This can lead to the creation of a single highest standard for all contracting parties to BIT's with a particular State."[20]

While it has been argued that umbrella clauses or MFN clauses can lead to weaken the coherence and to the fragmentation of International Law, we rather consider as does Gaillard that: "such a clause strongly contributes to bring uniformity to the protection offered by each State to the investors operating in its territory".[21]

E) Assisting to the development of an international investment arbitral "jurisprudence"?

Furthermore, some authors have observed the increased number of awards where, by a similitude of the judicial issues in disputes under different BIT's containing similar provisions, Tribunals have paid particular attention to prior decisions. This phenomenon has led to talk about the development of an arbitral jurisprudence in international investment law(even if most arbitration rules such as the ICSID Convention do not admit any doctrine of precedent or "stare decisis"). As described by E. Gaillard: "The subject of investment protection treaties has allowed the development of an arbitral jurisprudence".[22]

Thus, despite the fact that ICSID users cannot exclusively rely on ICSID case law or foreign investments case law, it is unquestionable that decisions on such kind

[20] Redfern and Hunter on International Arbitration, N. Blackaby, C. Partasides, A. Redfern and M. Hunter, Student Version, Oxford University Press, Fifth Edition, page 50 at para 8.102

[21] Redfern and Hunter on International Arbitration, N. Blackaby, C. Partasides, A. Redfern and M. Hunter, Student Version, Oxford University Press, Fifth Edition, page 50 at para 8.102

[22] Self translation from the French original: "Une telle disposition contribute fortement à aligner le régime de la protection offerte par chaque Etat aux investisseurs operant sur son territoire" in E.Gaillard, L'arbitrage sur le Fondement des Traités de Protection des Investissements, Revue de l'Arbitrage 2003 no3 at page 861.

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of disputes are progressively more coherent between each other when related to similar facts.

Moreover, it is not a specific weak point of the ICSID system as, neither in other arbitration institutional rules, nor in the Statute of the International Court of Justice (article 36), is the doctrine of the binding precedent proclaimed.

As a consequence, even if host States and investors cannot count on prior Tribunal decisions, they know much better today what are the standards of qualification of some important concepts such as fair and equitable treatment, investment or foreign control, than they did years ago. The development of foreign investment arbitration jurisprudence applies in the whole foreign investment law field and concerns ICSID awards as well as awards rendered pursuant to other institutional arbitration rules, but this also undoubtedly provides the ICSID regime with more consistency.

We have seen the wide scope of jurisdiction of the Center with the notions of "investment" and "national of another State", the consent given by the State and the investor to submit their dispute to an arbitral tribunal constituted under ICSID rules, the direct recourse to arbitration and limitation of local remedies, the application of International Law, the recent explosion of BIT's and the core set of protections that they usually contain, as well as the relationship between BIT'S, ICSID awards and the development of International Law simultaneously with the development of an investment protection arbitral "jurisprudence".[23]

All these features of the ICSID regime and the foreign investments field, established by the international investment community itself for its own use, have

[23] Self translation from the French original : "La matière des traités de protection des investissements a permis le développement d'une jurisprudence arbitrale (…)" in E.Gaillard, L'arbitrage sur le Fondement des Traités de Protection des Investissements, Revue de l'Arbitrage 2003 no3 at page 859

progressively led to the recognition of the ICSID dispute settlement rules as an efficient machinery for the purpose of the protection of foreign investments between States and nationals of other States.

II THE BINDING FORCE AND THE FINALITY OF ICSID AWARDS: RECOGNITION, ENFORCEMENT AND ABSENCE OF APPEAL ON THE MERITS:

Articles 53.1 and 54.1 of the ICSID Convention set up an international obligation for the parties to the dispute to comply with the terms of the award.

While the finality of the award is established in article 53.1: "The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this convention (…)" Article 54.1 determines the recognition and enforcement of ICSID awards and reads as follows: "Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State".[24]

A) Recognition of ICSID awards and Enforcement of Pecuniary Obligations:

At this level we should remember the difference between recognition and enforcement of the award, according to C.H Schreuer: "Recognition has two possible effects. One is the confirmation of the award as binding or res judicata. The other is a step preliminary to enforcement. In a particular case, both effects may arise simultaneously."[25]

[24] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Washington, 18 March 1965.Arts. 53.1 and 54.1

[25] C.H Schreuer, The ICSID Convention: A Commentary, Cambridge University Press, ed. 2009, at page 1128 para 42-43

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As a consequence of article 54.1, each Contracting State party to the ICSID Convention is obliged to recognize an ICSID final award and, if the Contracting State has a federal system, the award may be recognized as a final judgment of a court of a constituent state of that Contracting State.

Many authors, including C.H Schreuer, have described the enforcement provision established in article 54 as "a distinctive feature of the ICSID Convention"(3) as "most other instruments governing international dispute settlement do not cover enforcement but leave this issue to domestic laws or applicable treaties."[26]

By means of Articles 53 and 54, the ICSID Convention thus "created an autonomous and simplified regime for recognition and execution which excluded the otherwise applicable provisions of the [local civil procedure law] and the remedies provided therein."[27]

According to the ICSID provisions, recognition and enforcement are automatic even if these are differentiated and separated procedures. In Benvenuti & Bonfant v People's Republic of the Congo, the "Cour d'Appel" in France held that, in determining whether exequatur should be granted, the lower court ("Tribunal de Grande Instance de Paris") was limited to determine the authenticity of the award. The "Cour d'Appel" also declared that issues of immunity were relevant at the stage of execution.[28]

As a specificity of the ICSID regime, there is no traditional procedure of exequatur for ICSID awards but a verification of its authenticity. Therefore, only if a party

[26] C.H Schreuer, The ICSID Convention: A Commentary, Cambridge University Press, ed. 2009, at pages 1117-1118 para 3

[27] C.H Schreuer, The ICSID Convention: A Commentary, Cambridge University Press,ed. 2001, at page 1118

[28] Cour d'appel, Paris, Decision of June 26, 1981, 108 Journal du droit international 843 (1981)

violates its obligation to satisfy the award, has the procedure of execution to be started.

It is important to note that we will follow the opinion of C.H Schreuer considering that the terms "enforcement" and "execution", present in the English authentic version, have the same meaning, in accordance with a coherent interpretation taking into account the French and Spanish equally authentic versions of the ICSID Convention.

Conforming to Article 54.3, it is the local law regarding execution of judgments in the State where enforcement is sought that will determine if a specific asset may be seized to satisfy an ICSID award. Therefore, this provision constitutes an exception to the exclusion of any remedy rule established in article 26 by requiring the intervention of domestic courts.

While the automatic recognition of ICISD awards and its "res judicata effect" extend to any obligation imposed by the award, what is sought at the enforcement stage is the execution of the pecuniary obligations that have been declared as enforcement of non-pecuniary obligations is not intended in the ICSID Convention.

In accordance with C.H Schreuer's point of view: "Tribunals imposing such non-pecuniary obligations should keep the impossibility to enforce them in mind. Such awards should (…) provide for a pecuniary alternative in case of non-performance such as liquidated damages, penalties or another obligation to pay a certain amount of money."[29]

As stated before, article 54.3 determines that the law of the State where enforcement is sought shall govern the execution of the award. Next article goes

[29] C.H Schreuer, The ICSID Convention: A Commentary, Cambridge University Press, ed. 2009, at page 1138 para. 79

further in confirming the role of domestic law proclaiming that: "Nothing in article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State".[30]

B) The restrictive State Immunity Doctrine: a sour taste for the compliance with the award?

The doctrine of sovereign immunity has often been called the Achilles' heel of the ICSID system. Historically, foreign States were considered to enjoy absolute immunity from jurisdiction and measures of execution from courts other than their own. Historically, actions against another State could only be brought with an express consent.

In the ICSID system, even if consent to ICSID arbitration by a State constitutes an implicit waiver of immunity of jurisdiction, this does not however imply a waiver of immunity of execution.

Nevertheless, with the growing involvement of States in commercial activities, we have been assisting to the growing development of the restrictive State immunity doctrine too. It is based on the distinction between acts that have been realized under sovereign authority, or acta jure imperii, and private acts, or acta jure gestionis, where only the former can benefit from immunity of execution.

This doctrine has been recognized in the European Convention on State Immunity of 1972, as well as in the USA Foreign State Immunity Act of 1976 and the British State Immunity Act of 1978.

This doctrine has been interpreted in a way allowing assets of States, not used for a public purpose, to be seized in order to satisfy the execution of an award. Thus, execution is now permitted against funds held by defaulting States for

[30] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Washington, 18 March 1965.Art. 54.3

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commercial purposes, even if Courts haven until recently show great respect for foreign States' assets.

"On the particular facts of the Soabi v Senegal case, the "Cour d'Appel" concluded that sovereign immunity would protect the threatened Senegalese assets unless it was proven that the assets at issue were for an actiity considered economic and commercial under private law. The "Cour d'Appel" held that the claimant had not made the requisite showing. Therefore, the assets in question remained protected from execution by sovereign immunity".[31]

"In AIG Capital Partners v Kazakhstan, AIG sought to execute its ICSID judgment against cash and securities located in London and owned by the National Bank of Kazakhstan (NBK). NBK intervened in the case and claimed that the assets were immune from enforcement under the English State Immunity Act.23. Citing Article 55 of the ICSID Convention, the court applied the Immunity Act and held that NBK's assets were immune from execution."[32]

Despite the fact that the ICSID Convention provides for an autonomous and self-contained regime on recognition and enforcement that makes its specificity in comparison with other institutional arbitration rules, when a party doesn't want to comply with the terms of the award and the other party starts the enforcement procedure, the doctrine of State Immunity (even if restricted) and the domestic law governing execution still apply.

But at the end it seems quite normal that a Court will not attribute more force to the execution of an international arbitral award than to an award rendered pursuant to its own legislation or a judgment of one of its own courts.

[31] E. Baldwin, M. Kantor and M. Nolan, Limits to Enforcement of ICSID Awards, Journal of International Arbitration 23(1): 1–24, 2006, at page 9

[32] E. Baldwin, M. Kantor and M. Nolan, Limits to Enforcement of ICSID Awards, Journal of International Arbitration 23(1):1–24, 2006, at page 10

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Moreover, forum shopping for execution is still an available option for a private party to find a restrictive application of the immunity doctrine in a country where assets of the State party to the dispute are found.

Furthermore, in case of a State's violation of its international obligation to comply with the enforcement of an ICSID award, diplomatic protection of the investor by its own State can be reactivated under Article 27 of the ICSID Convention. State Responsibility could also be engaged in a dispute submitted to the International Court of Justice according to Article 64 of the Convention.

Anyway, usually a State will comply with its obligations if it wants to continue attracting foreign investors, as well as an investor will also usually comply with its obligations in order to conserve its reputation in its own sector of activity.[33]

C) Limited Grounds for Annulment of ICSID awards:

The provisions for the request of interpretation, revision or annulment of an ICSID award can be found in Section 5 of Chapter IV of the ICSID Convention at Articles 50, 51 and 52. Of these procedures, the closest to a full review of the award is annulment.

As we have seen before, the finality of ICSID awards has been established by Article 53.1: "The award (…) shall not be subject to any appeal or to any other remedy except those provided for in this Convention."[34]

According to this provision it is the Washington Convention itself that provides for a self-controlling mechanism of final awards rendered pursuant to its rules. An ICSID award cannot be reviewed by national courts as the Convention creates an

[33] C.H. Schreuer, The ICSID Convention: A Commentary, Cambridge University Press, ed. 2009, page 899 at para.3

[34] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Washington, 18 March 1965.Art.53.1

The growing number of disputes resolved under The International Centre for Settlement of Investment Disputes (ICSID) rules, has contributed to consider the ICSID as a widely established legal system for the protection of foreign investment."

autonomous system in which the jurisdiction of national courts has been excluded by consent.[35]

Article 52.1 states the exhaustive list of specific grounds on which a party may request an annulment. A new Tribunal (Ad Hoc Committee) will have to be constituted and "shall have the authority to annul the award of any part thereof on any of the grounds set forth in paragraph 1."[36] If the award is finally annulled, either party may request to submit the dispute to a new ICSID Tribunal (Article 52.6).

This Article has often been qualified as a limited exception to the principle of the finality of awards as. At this stage it is important to distinguish between appeal and annulment.

According to C.H Schreuer: "the result of a successful application for annulment is the invalidation of the original decision. The result of a successful appeal is its modification. A decision-maker exercising the power to annul has only the choice between leaving the original decision intact or declaring it void."[37]

That is to say, there is no possibility under the ICSID Convention to review the award on the merits, neither is it possible to challenge the award before national courts as the Convention set up an internal mechanism that excludes their jurisdiction. Annulment in ICSID is in fact quite restrictive as it doesn't even mention the notion of public policy as a ground for annulment or revision of the award, contrary to other institutional arbitration rules such as UNCITRAL at its Article 36 where public policy is a standard ground for annulment.

[35] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Washington, 18 March 1965.Art.51.1

[36] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Washington, 18 March 1965.

[37] (4) C.H Schreuer, The ICSID Convention: A Commentary, Cambridge University Press, ed. 2009, page 901 para 10

The growing number of disputes resolved under The International Centre for Settlement of Investment Disputes (ICSID) rules, has contributed to consider the ICSID as a widely established legal system for the protection of foreign investment."

The specific grounds are:[38]

a) Improper constitution of the Tribunal

b) Manifest excess of power: this ground includes a failure to apply the proper law, as well as a lack of jurisdiction and a failure to exercise jurisdiction. A tribunal can "breach this provision not only if it exercises a jurisdiction which it does not have under the relevant treaty, but also if it fails to exercise a jurisdiction which it does possess under the relevant instruments."[39]

c) Corruption on the part of a member of the Tribunal

d) Serious departure from a fundamental rule of procedure: this ground particularly includes the right to be heard, issue of impartiality and deliberation of the Tribunal and evidence and proof of facts.

e) Failure to state the reasons on which the award is based: this means when there is a total absence of reasons or when these are insufficient or inadequate, that is to say, "allowing the reader to follow the arbitral tribunal's reasoning, on facts and on law."[40]

However, annulment for failure to comply with Article 48.3(failure to deal with every question) would only be appropriate where the reasoning in the award as a whole fails to satisfy the "minimum requirement", the normal remedy should be an application for supplementation.[41]

[38] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Washington, 18 March 1965.Art.52.1

[39] C.H Schreuer, The ICSID Convention: A Commentary, Cambridge University Press, ed.2001, page 937 para 151

[40] Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais (ICSID Case No. ARB/81/2), Ad hoc Committee Decision on Annulment of May 3, 1985,para 119

[41] C.H Schreuer, The ICSID Convention: A Commentary, Cambridge University Press, ed.2001, page 818 para 52

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We can observe that the ICSID Convention establish a high standard for annulment of awards rendered pursuant to its provisions which confirms the principle of finality of the award. There is no possibility of appeal on the merits; neither can the award be annulled on the ground of public policy. Article 52 provides for an exhaustive list and creates an original self-controlling mechanism for ICSID awards excluding jurisdiction by national courts. The only recourse a party has is to apply to the Centre to have the award annulled.

This is probably why most commentators support the opinion that the ICSID Convention precludes a waiver of the right to request annulment on the basis that Article 52 is not subject to modification. According to C.H Schreuer, "annulment is only concerned with the legitimacy of the process of decision".[42] Thus, it can be argued that Article 52 preserves the integrity of the ICSID mechanism and operates as a public order guarantee for the ICSID arbitration system.

CONCLUSION:

The existence of investor-State dispute settlement mechanism is a key factor of investment protection. "The arbitration system denationalizes and depoliticizes conflicts between investors and States within a legal framework."[43]

It is in this context that the ICSID Convention has come to create a full-contained dispute settlement mechanism in the foreign investment landscape. We have seen in this paper how the proliferation of BIT's and the consequent development of international investment law have triggered the number of users of the system and consequently ICSID caseload.

[42] C.H Schreuer, The ICSID Convention: A Commentary, Cambridge University Press, ed.2009 at page 901 para 11

[43] J. Steffens, Expectations of Government and investors vs. Practice: The Government view on BIT's, ICSID Review-Foreign Investment Law Journal, Volume 24 number 2 (Fall 2009)

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We can conclude, in the light of Lauterpacht's assertion, that the ICSID Convention has established an investment arbitration system where the investor can sue the Contracting State with the exclusion of any other remedy. Once the host State has given its consent, whether expressed in a treaty or in an agreement between the investor and the State, the former has a direct recourse to ICSID arbitration.

We have also seen how the Convention has set up international law, as the applicable law to the dispute, on the same foot as the host State's domestic law. The Convention also provides for the automatic recognition and enforcement of ICSID awards. Even if national legislations still apply in case of an execution procedure, a restrictive doctrine of State immunity has been adopted in an important number of countries.

ICSID has progressively been recognized as an effective system of investment arbitration to foster the protection of foreign investments and it is likely to continue, thus contributing to characterize, as Judge Schwebel did, the right to arbitrate investment disputes as "one of the most progressive development of international human rights (including the right to own property) and with dethroning the State from its status as the sole subject of international law".[44]

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